SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 35

THE UNITED STATES OF AMERICA, PETITIONER

vs.

AETNA CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the United States Circuit Court of Appeals for the Second Circuit

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF-APPELLANT

against

UNITED STATES OF AMERICA, POST OFFICE DEPARTMENT, DEFENDANT-APPELLEE

Statement under rule 13

This action was commenced by the service of a summons and complaint on or about the 28th day of May, 1947.

On January 22, 1948, an order was made by Hon. Harold M. Kennedy and entered in the office of the Clerk of the United States District Court for the Eastern District of New York, granting a motion made by the defendant to dismiss the complaint herein. The plaintiff appeals from the order as entered.

The plaintiff is represented by Edward W. Springsteen, as its attorney. The defendant appears by Hon. J. Vincent Keogh, United States attorney for the Eastern District of New York.

There has been no change in parties or attorneys since the commencement of the within action.

2 In the District Court of the United States for the Eastern District of New York, Tort Division

Civil Action File No. 8130

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, POST OFFICE DEPARTMENT, DEFENDANT

Summons

To the above-named Defendant:

You are hereby summoned and required to serve upon Edward W. Springsteen, plaintiff's attorney, whose address is 111 Fulton Street, New York City, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[seal of court]

PERCY G. B. GILKES,
Clerk of Court.
By JOHN R. SCOTT, Jr.,
Deputy Clerk.

Dated: New York, May 28, 1947.

3 In the United States District Court

[Same title]

Complaint

The plaintiff herein by its attorney, Edward W. Springsteen, complaining of the defendant, alleges, upon information and belief:

FOR A FIRST CAUSE OF ACTION

I. That the plaintiff is and was at all the times hereinafter mentioned, a foreign insurance corporation, organized and existing under and by virtue of the laws of the State of Connecticut, and was duly licensed and authorized to transact the business of Workmen's Compensation Insurance in the State of New York, and maintained an office at 26 Court Street, in the Borough of Brooklyn, County of Kings, State of New York.

II. That the defendant is the Post Office Department of the United States of America, and operated, maintained, used and controlled the premises known as the New York General Post Office at 33rd Street and 8th Avenue, New York City.

III. That in the course of its business as aforesaid, the plaintiff issued a certain Workmen's Compensation Policy numbered 1-C-10052, wherein and whereby the plaintiff insured Federal Reserve Bank of New York against its liability for Workmen's Compensation payable to its employees, pursuant to Chapter 41 of the Laws of the State of New York, now known as the
4 Workmen's Compensation Law and Amendments thereto, for the period from January 1, 1945 to January 1, 1946; that the policy was in full force and effect on February 8, 1945.

IV. That the defendant, in the course of its business, operated, maintained, controlled and used a certain overhead mail sack conveyor at, near or in the vicinity of the loading platform at its General Post Office, 33rd Street and 8th Avenue, in the Borough of Manhattan, City of New York.

V. That on February 8, 1945, at or about 5:40 p. m., Peter Vambell, an employee of the Federal Reserve Bank of New York, while in the course of his employment, was legally and lawfully proceeding on the loading platform of the General Post Office at 33rd Street and 8th Avenue, in the Borough of Manhattan, City of New York, into the building, pushing a hand mail truck containing bags of registered mail belonging to the Federal Reserve Bank of New York and was, of necessity, proceeding beneath a certain conveyor which was attached to a chute upon which there were a number of filled mail sacks, when suddenly and without warning some of the mail sacks fell from the conveyor

due to the careless, negligent and improper manner in which the defendant, its agents, servants or employees loaded, controlled, used and operated the said conveyor, striking the said Peter Vambell, knocking him to the floor and rendering him unconscious.

VI. That the aforesaid mentioned occurrence and the injuries to the said Peter Vambell were occasioned without any negligence or lack of care on his part, but solely by reason of the carelessness and negligence of the defendant, its agents, servants or employees in the manner in which they operated, maintained, controlled and made use of their building, particularly that part known as a conveyor chute, allowing and permitting certain mail sacks or bags to fall therefrom upon the person of the said Peter Vambell.

VII. That solely by reason of the negligence of the defendant as aforesaid and as a result of being struck by said mail bag or bags, Peter Vambell was rendered sick, sore and disabled, sustained a severe shock to his nervous system, and suffered various and divers injuries, external and internal, to his head, brain and nervous structure, and other bodily injuries.

VIII. That some of such injuries so sustained will be permanent and that Peter Vambell has been compelled and, upon information and belief, will be compelled in the future to undergo great pain and suffering, and has been compelled and will be compelled to lose his income and wages in his occupation as guard and registered mail convoy for the Federal Reserve Bank of New York, by reason of all of which he has been damaged in the sum of twenty thousand and 00/100 ($20,000.00) dollars.

IX. That subsequent to the date of the alleged accident and prior to the commencement of this action, a claim for Workmen's Compensation benefits was made by Peter Vambell under the Workmen's Compensation Law of the State of New York, and that he gave his employer, the Federal Reserve Bank of New York, due notice of the claim for compensation, all in accordance with the provisions of the Workmen's Compensation Law of the State of New York.

X. That thereafter and prior to the commencement of this action, there were hearings held in accordance with the provisions of the Workmen's Compensation Law, and Peter Vambell received and accepted from the plaintiff certain sums of money due him, all in accordance with the provisions of the Workmen's Compensation Law of the State of New York, which sums of money were paid by the plaintiff.

XI. That more than one year has elapsed since this accident occurred and that there is no action now pending by the said Peter Vambell against the defendant to recover for the injuries so sustained.

XII. That prior to the commencement of this action, due notice of claim was served upon the office of the Post Office Department in New York County, State of New York, by letter under date of April 26, 1946, due notice of the said receipt was made by the Post Office Department, Office of the Solicitor, Washington, D. C., under date of May 15, 1946, and that subsequent thereto and under date of September 16, 1946, a notice was sent to the General Post Office in the City of New York, 33rd Street, and 8th Avenue, advising the said Post Office Department that the claim of the Aetna Casualty & Surety Company was being withdrawn from consideration and advising that an action would be started pursuant to the Federal Tort Claims Act.

XIII. That thereafter and prior to the commencement of this action, Peter Vambell duly elected to accept compensation under the Workmen's Compensation Law of the State of New York and has accepted the sum which the plaintiff herein has paid, and that by reason thereof an assignment by operation of statute was made to the plaintiff herein pursuant to the Workmen's Compensation Law of the State of New York, and the plaintiff is duly assigned to any right, claim, demand, right or rights of action which
7 exist or may exist for the benefit of the said Peter Vambell against the defendant, arising from the aforesaid occurrence and injuries to the said Peter Vambell.

XIV. That by reason of the aforesaid, the plaintiff has been damaged and is entitled to recover from the defendant herein the sum of twenty thousand & 00/100 ($20,000.00) dollars.

FOR A SECOND CAUSE OF ACTION

XV. The plaintiff repeats and re-alleges as a part of this Cause of Action all the allegations contained in paragraphs numbered "I," "II," "III," "IV," "V," "VI," and "VIII."

XVI. That the plaintiff, in accordance with the policy of Workmen's Compensation Insurance covering the Federal Reserve Bank of New York, paid the sum of three hundred forty-eight and 67/100 ($348.67) dollars for medical treatment necessitated by Peter Vambell's condition for which is employer, the Federal Reserve Bank of New York, was responsible under the Workmen's Compensation Law of the State of New York, thereby becoming subrogated to any right, claim, demand, right or rights of action which exist or may exist for the benefit of the said Peter Vambell and the Federal Reserve Bank of New York, arising from the aforesaid occurrence and the injuries to the said Peter Vambell.

XVII. That by reason of the aforesaid payments, the plaintiff has been damaged and is entitled to recover from the defendant

herein the sum of three hundred forty-eight and 67/100 ($348.67) dollars.

8 Wherefore the plaintiff demands judgment against the defendant for the sum of twenty thousand, three hundred forty-eight and 67/100 ($20,348.67) dollars, together with the costs and disbursements of this action.

EDWARD W. SPRINGSTEEN,
Attorney for Plaintiff,
Office and P. O. Address, 111 Fulton Street,
Borough of Manhattan, City of New York, 7.

Verified on May 27, 1947, by Edward W. Springsteen as Plaintiff's attorney.

9 In the United States District Court

[Same title]

Notice of motion to dismiss

SIRS: Please take notice that the United States of America, defendant herein, will move this Court at a Term for Motions to be held in the courtroom thereof at the Federal Courthouse, 271 Washington Street, Brooklyn, New York, on the 20th day of August 1947, at 10:30 a. m. in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint and the action herein on the ground that the Federal Tort Claims Act does not authorize the maintenance of an action by a subrogee or assignee of a cause of action thereunder, and on the further ground that this action is barred by Sec. 203 of Title 31 United States Code, and that this Court lacks jurisdiction to entertain this action and for such other and further relief as to the Court will seem just and proper.

Dated: Brooklyn, New York, July 24, 1947.

Yours, etc.

J. VINCENT KEOGH,
United States Attorney, Eastern District of New York,
Attorney for Defendant, Office and P. O. Address, 271
Washington Street, Brooklyn, New York.
By ELI RESNIKOFF,
Assistant U. S. Attorney.

10 In the United States District Court

[Same title]

Affidavit of Eli Resnikoff, read in support of motion

Eli Resnikoff, being duly sworn, says:

1. I am an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such, in charge of this action on behalf of the defendant herein, and familiar with the facts and circumstances of the alleged cause of action and with the proceedings heretofore had herein.

2. This affidavit is respectfully submitted in support of the motion by the defendant to dismiss the complaint on the ground that the Federal Tort Claims Act (Public Law No. 601, 79th Cong., 2nd Sess. (August 2, 1946) Chapter 753, Title 4, Section 401–424), under which this action was brought, does not authorize the maintenance of suits upon derivative claims such as the suit by the plaintiff herein who is a subrogee and an assignee of the alleged claim, and on the further ground that the action is prohibited by Section 203 of Title 31 United States Code, so that this court lacks jurisdiction to entertain this action.

3. This action was commenced by the filing of a summons and complaint on May 28, 1947. Service of process was made on the United States Attorney for the Eastern District of New York on May 29, 1947, and upon the Attorney General of the United States, in accordance with the provisions of the Act. The time of the defendant to appear, answer or move herein has not yet expired.

Affidavit of Eli Resnikoff, Read in Support of Motion

11 4. The complaint alleges for a first cause of action that plaintiff is an insurance corporation, organized and existing under the laws of the State of Connecticut, and duly transacting the business of Workmen's Compensation Insurance in the State of New York, that as such it insured the Federal Reserve Bank of New York against its liability for Workmen's Compensation payable to its employees, pursuant to the Workmen's Compensation Law; that on February 8, 1945, one Peter Vambell, an employee of said bank, was injured in the course of his employment while pushing a hand mail truck containing bags of mail belonging to the bank in the vicinity of a loading platform in the General Post Office Building of the defendant at 33rd Street and 8th Avenue, Borough of Manhattan, City of New York, where some mail sacks fell upon him from an overhead conveyor due to the negligence of the defendants, its agents, servants or employees without any negligence on the part of the said Peter Vambell, as a result of which he sustained personal injuries and the loss of income and wages, past and future, to his damage in the sum of $20,000; that he received from the plaintiff certain sums of money due him, in accordance with the provisions of the Workmen's Compensation Law; that more than one year has elapsed since the accident occurred and that no action has been brought by him against the defendant to recover for the injuries

so sustained; that on April 26, 1946, plaintiff served notice claim upon the Post Office Department which was withdrawn on September 16, 1946, by a notice advising the Department that an action would be started pursuant to the Federal Tort Claims Act; that Peter Vambell elected to accept compensation under the Workmen's Compensation Law of the State of New York, and accepted the sum which the plaintiff has paid him, and that by reason thereof an assignment by operation of statute was
12 made to the plaintiff pursuant to said statute and that plaintiff is duly assigned to any right of action which exists for the benefit of said Peter Vambell against the defendant arising from the aforesaid occurrence and injuries to him and that by reason of the aforesaid plaintiff has been damaged and is entitled to recover from the defendant the sum of $20,000.

5. Plaintiff alleges for a second cause of action that it paid the sum of $348.67 for medical treatment of said Peter Vambell's condition, for which the employer aforementioned was responsible under the Workmen's Compensation Law, thereby becoming subrogated to any claim or right of action which may exist for the benefit of said Peter Vambell and his employer arising from the aforesaid occurrence and injuries sustained by him, and that by reason of the said payments plaintiff has been damaged and is entitled to recover from the defendant the said sum of $348,67, making a total of $20,348.67, for which plaintiff demands judgment against the defendant with costs and disbursements.

6. There is no allegation of the amount of the payments made by the plaintiff to Peter Vambell, as alleged in the first cause of action. Ordinarily, in an action under similar circumstances against an individual defendant the plaintiff would, upon obtaining judgment, be obliged to pay to the injured plaintiff the balance of the recovery over and above the amounts paid by it to the injured employee for expenses of medical treatment and other compensation benefits and costs and disbursements of the action, pursuant to the provisions of the Workmen's Compensation Law.

7. Plaintiff in this action similarly seeks to recover the full amount of damages for the personal injuries sustained by
13 Peter Vambell and the amount paid by plaintiff for his medical treatment, and seeks to accomplish this purpose by bringing the action under the provisions of the Federal Tort Claims Act. It is respectfully submitted that the Act does not authorize or contemplate an action of this kind. In all the language used in the Act there is no reference to an assignee or subrogee, and since the purpose of the Act is to grant specific rights to a specific group, it must be strictly interpreted and applied.

8. It is further respectfully submitted that the alleged subrogation and assignment of the claim and cause of action of Peter Vambell is null and void as against the United States of America under the provisions of Section 203 of Title 31 United States Code, since no assignment of the claim was made in accordance with the requirements of said statute.

Wherefore, the court is respectfully requested to dismiss the complaint, with costs to the defendant.

ELI RESNIKOFF.

Sworn to July 24, 1947.

To: Edward W. Springsteen, Esq., Attorney for Plaintiff, 111 Fulton Street, New York 7, New York, Clerk of this Court.

14 In the United States District Court

[Same Title]

Affidavit of Edward W. Springsteen, read in opposition to motion

STATE OF NEW YORK,
County of New York, ss:

Edward W. Springsteen, being duly sworn, deposes and says: That he is the attorney for the plaintiff in this action.

That this affidavit is in answer to a motion made by the United States Attorney for the Eastern District of New York to dismiss the complaint in the action herein on the ground that the Federal Tort Claims Act does not authorize the maintenance of an action by a subrogee or assignee of a cause of action thereunder, and for the further ground that the action is barred by Section 203 of Title 31 of the United States Code, and that this Court lacks jurisdiction to entertain this action, and for such other and further relief as the Court will deem just.

The Federal Tort Claims Act became a law on August 2, 1946 and under Part 3, Section 410, reads as follows:

"(a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on
15 any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for

such damage, loss, injury, or death in accordance with the law of the place where the act or ommission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

"(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: Provided, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: Provided further, That
16 as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section."

The plaintiff in this action issued a policy of insurance to the Federal Reserve Bank of New York, 33 Liberty Street, New York City, under which policy it covered the Bank against its liability for workmen's compensation payable to its employees pursuant to the laws of the State of New York. On February 8, 1945, one Peter Vambell, an employee of the Federal Reserve Bank of New York, while in the course of his employment, was injured while in the General Post office at 33rd Street and 8th Avenue, New York City, and the facts of the accident led us to believe that the injuries were sustained due to the negligent maintenance, operation and control of a certain conveyor carrying some mail. As a result of the injuries sustained, Peter Vambell received and accepted certain compensation benefits from the plaintiff in this action as insurer of the Federal Reserve Bank of New York pursuant to certain awards, and as a result of this, the position of the plaintiff in this action is that of an Assignee by operation of law.

All of the rights derived by the plaintiff are contained in paragraph 2, Section 29, of the Workmen's Compensation Law of the State of New York, which reads as follows:

17 "If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefore by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover, from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. When the compensation awarded requires periodical payments the number of which cannot be determined at the time of such award, the board shall, when the injury or death was caused by the negligence or wrong of another not in the same employ, estimate the probable total amount thereof upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and such facts as it may deem pertinent, and such estimate shall be deemed the amount of the compensation awarded in such case, for the purpose of computing
18 the amount of such excess recovery, subject to the modification thereof as hereinafter provided."

As can be seen by the above quoted statute, there seems to be no question about the jurisdiction of this Court, and Section 410 states, in part, that it covers "damages to or loss of property or on account of personal injuries or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or ommission occurred;" and hence, as this occurence took place in the State of New York and as the injured person received and accepted workmen's compensation from the plaintiff pursuant to the laws of the State of New York, and for the further fact that by reason of the operation of the New York Statute, the plaintiff became as-

signed to the rights of the claimant and the Court seems to have the necessary jurisdiction.

As to the second point referred to by the United States Attorney, namely, that this action is barred by Section 203 of Title 31 of the United States Code, your deponent would respectfully refer the Court to case of Morgenthau vs. Fidelity & Deposit Co. of Maryland, reported in 95 Federal Reporter, 2nd ed., Page 632, in which the Court held that Section 203 of Title 31 of the United States Code annotated does not apply to assignments by operation of law. The Court, in deciding that case in 1937, referred to the following precedents supporting the conclusion—

"Price vs. Forrest, 173, U. S. 410, 19 S. Ct. 434, 43 L. Ed. 749;

19 "National Bank of Commerce of Seattle vs. Downn, 218 U. S. 345, 31 S. Ct. 89, 54 L. Ed. 1065, 20 Ann. Case 1116;

"Houston vs. Ornes, 252 U. S. 469, 40 S. Ct. 369, 64 L. Ed. 667."

The United States Attorney states that the Act must be strictly interpreted and applied. As a matter of fact, there is nothing in the Act which excludes claims by an Assignee and hence, there is no way by which we could conclude, as he does, that an individual's rights would be wiped out by an assignment, particularly when we were dealing with an assignment by operation of law.

Therefore, your deponent respectfully requests that this motion be denied and that the United States of America, Post Office Department, be directed to answer the complaint in this action.

EDWARD W. SPRINGSTEEN.

Sworn to August 13, 1947.

20 In the United States District Court

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

J. Vincent Keogh, United States Attorney, Attorney for Defendant, Office and P. O. Address, Federal Building, 271 Washington Street, Brooklyn, New York.

Edward W. Springsteen, Attorney for Plaintiff, 111 Fulton Street, New York 7, N. Y.

Opinion of Kennedy, D. J.

KENNEDY, D. J.

The claimant in this action alleges that on February 8, 1945, one Peter Vambell, employed by the Federal Reserve Bank of New York, was injured near the loading platform of the General Post Office Building at 33rd Street and 8th Avenue, Borough of Manhattan, City of New York, as the result of the negligence of

the Post Office employees. It is averred that the plaintiff had, prior to that date, issued a Workmen's Compensation Policy to Vambell's employer and that pursuant to the policy Vambell received and accepted certain sums of money due him, but did not within one year after the accident bring suit against the
21 defendant. It is said that the plaintiff filed its claim with the Post Office Department under date of April 26, 1946, but withdrew it on September 16, 1946. This claim asserted that plaintiff is the subrogee of Vambell (Workmen's Compensation Law of State of New York, Section 29, Paragraph 2).

Plaintiff believes it is entitled to maintain suit against the Government under Section 410 of the Federal Tort Claims Act (28 U. S. C. A., Section 931). Defendant, urging that the Section last mentioned does not permit suit by subrogee, but only by direct claimants, moves to dismiss the complaint. Plaintiff argues that not only under the express language of the Federal Tort Claims Act, but also by analogy with the suits in Admiralty Act (46 U. S. C. A., Section 742), any subrogee is given the benefit of the Government waiver of immunity, equally with a person injured or killed (citing Phoenix Insurance Co. of Hartford vs. United States, and Fidelity & Guaranty Co. vs. United States, and also a very recent case holding squarely that plaintiff's position is correct and that a subrogee may maintain suit under the statute in question, namely, Hill vs. United States.

As I see the problem, there is nothing before me but a question of interpretation of a statute. I am not impressed with the asserted analogy between the Suits in Admiralty Act and the statute upon which complaint at bar is founded, so far as that analogy is said to support the right of subrogee to sue. It can hardly be shown that there is a close analogy between a statute on the one hand like the Federal Tort Claims Act which gives the Court of the United States jurisdiction to render and determine judgment on any claim against United States for money only, accruing on and after January 1, 1945, on account of damages to or
22 loss of property or on account of personal injury or death; and on the other hand a statute which, like the Suits in Admiralty Act, provides for the bringing of a libel in personam against the United States in a case where a proceeding in admiralty could be maintained against private owners. It is true that both statutes to some extent put the Government on the same footing as private persons so far as liability is concerned, the one providing for liability according to the *lex loci delicti*, and the other tacitly providing for liability according to admiralty concept. But it seems to me that the language of the Suits in Admiralty Act is much broader than that found in the Federal Tort Claims Act.

Nor does the Legislative history of the statute under discussion

shed much light on its true meaning, although there are found in that history some passing reference to the question whether Congress intended that subrogees might bring suit.

As I understand Section 410 of the Federal Tort Claims Act, it raises the bar of sovereign immunity only with respect to any claim against the United States on account of damages to or loss of property or on account of personal injury or death under circumstances where the Government would be liable to the claimant for such damage, loss, injury or death all in accordance with the law of the place where the act or omission occurred. Surely this description on its fact does not cover the claim of a subrogee who has under a contract of insurance and in order to earn a premium, made a payment to the injured person.

I agree with a number of things said by Judge Dooley in Hill vs. United States, but not with his conclusion. For example, it is clear to me that the Anti Assignment Act (31 U. S. C. A., 23 Section 203) does not apply to suits under the Federal Tort Claims Act. It is also clearly prescribed that local substitutive law and not Federal Law supplies the rule for decision of cases against the Government under the statute, and the law of Texas, in which form the Hill case was decided, is substantially the same as the law of New York, in that under the statute scheme of Workmen's Compensation the carrier automatically becomes the assignee of the claim of the debtor injured employee upon payment by the carrier, provided that no direct suit is instituted against the tort feasor by the victim of the tort.

However, I cannot be influenced in my interpretation of this Federal Statute by the general rule in force in the State for the determination of liability generally between a subrogee and a tort feasor. What counts is the specific grant by Congress to a specific person of the right to bring a specific form of action against the Government which, were it not for the statute, would be barred, and the specific form of action permitted is by this statute one based mainly on claim on account of damage to or loss of property or on account of personal injury or death, and the specific persons who here benefit by the statute are claimants for such damage, loss, injury, or death. To hold that this covers the case of a subrogee as I view the matter would be to do violence to the language of the statute. It seems to me idle to argue that in general the suit of a subrogee is identical with the underlying tort claim itself.

It is quite true, as Judge Bright says in U. S. Fidelity & Guaranty Co. vs. United States, speaking of a case where suit was brought by an insurance carrier under the Longshoremen's & Harbor Workers' Compensation Act, that "the recovery here sought is the same which the employee himself might seek and

would be within the jurisdiction asserted. That it is
24 brought in the name of someone else, who by Federal Law is given the right to sue, does not and should not change the jurisdiction status." But it is wholly unnecessary here, in view of the specific character of the statute, to go into the question of whether, generally speaking, a subrogee's suit is identical with that of the person in whose rights he claims. The question here, to paraphrase Judge Bright, is whether by this particular Federal Law, the subrogee may sue at all, and under a statute waiving sovereign immunity he certainly cannot unless he brings his suit clearly within the statute described, as here he has not done.

Motion granted—submit order.

HAROLD M. KENNEDY,
United States District Judge.

25 In the United States District Court for the Eastern District of New York

AETNA CASUALTY & SURETY COMPANY, PLAINTIFF

against

UNITED STATES OF AMERICA, POST OFFICE DEPARTMENT, DEFENDANT

Order appealed from

The defendant having moved for an order dismissing the complaint and the action herein on the ground that the Federal Tort Claims Act does not authorize the maintenance of an action by a subrogee or assignee of a clause of action thereunder, and the said motion having duly come on to be heard on the 20th day of August 1947,

Now, on reading and filing the notice of motion dated July 24, 1947, with proof of due service thereof thereto annexed, the affidavit of Eli Resnikoff, Esq., sworn to July 24, 1947, in support thereof, and the opposing affidavit of Edward W. Springsteen, Esq., sworn to August 13, 1947, and upon hearing J. Vincent Keogh, Esq., United States Attorney for the Eastern District of New York, attorney for defendant, by Eli Resnikoff, Esq., of counsel, in support of said motion, and Edward W. Springsteen, Esq., attorney for plaintiff, in opposition thereto, and due deliberation having been had thereon, and the Court's decision in writing having been filed herein.

26 Now, on motion of J. Vincent Keogh, Esq., United States Attorney for the Eastern District of New York, attorney for the plaintiff, it is

Ordered that the motion be and the same hereby is in all respects granted, and it is further

Ordered that the within action be and the same is hereby dismissed with costs.

Dated: Brooklyn, New York, January 22, 1948.

HAROLD M. KENNEDY,
U. S. D. J.

27 In the United States District Court

[Title omitted]

Notice of appeal

Notice is hereby given that the plaintiff above-named hereby appeals to the Circuit Court of Appeals for the Second Judicial Circuit from an Order made by Harold M. Kennedy, United States District Judge, and entered on the 22nd day of January 1948, which dismissed the plaintiff's cause of action with costs on the ground that the Federal Tort Claims Act does not authorize the maintenance of an action by a subrogee or assignee of a cause of action under said Federal Tort Claims Act.

Dated: New York, February 24, 1948.

EDWARD W. SPRINGSTEEN,
Attorney for Appellant,
Office and P. O. Address,
111 Fulton Street, New York 7, N. Y.

28 In the United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true and correct Transcript of Record of the District Court as agreed upon by the parties.

Dated: April 21, 1948.

EDWARD W. SPRINGSTEEN,
Attorney for Plaintiff-Appellant.
J. VINCENT KEOGH,
United States Attorney for the Eastern District of New York, Attorney for Defendant-Appellee.

29 In the United States District Court

[Title omitted]

Clerk's certificate

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America, for the Eastern District of New York, do hereby certify that the foregoing is the transcript record on appeal of the said District Court in the above-entitled matter, as agreed on by the parties, and that the last day to file said record is the 31st day of May 1948.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Eastern District of New York, this 21st day of April 1948, in the year of our Lord, one thousand nine hundred and forty-eight, and the Independence of these United States the one hundred and seventy-second.

[SEAL] PERCY G. B. GILKES, *Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 25—October Term, 1948

(Argued October 11, 1948 Decided November 4, 1948)

Docket No. 21030

AETNA CASUALITY & SURETY COMPANY, PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, POST OFFCE DEPARTMENT, DEFENDANT-APPELLEE

Before: L. HAND, Chief Judge, CLARK and FRANK, Circuit Judges

Appeal from an order of the United States District Court for the Eastern District of New York. Reversed and Remanded.

EDWARD W. SPRINGSTEEN (William A. Hyman and Harold W. Hayman, of counsel) for plaintiff-appellant.

H. G. MORISON (Paul A. Sweeney and Alvin O. West, of counsel); J. Vincent Keogh (Eli Resnikoff, of counsel) for defendant-appellee.

Opinion of the district court reported in 76 F. Supp. 333.

The complaint alleges that Peter Vambell, an employee of the Federal Reserve Bank of New York, was injured on February 8, 1945, as a result of the negligence of employees of the United States Post Office Department at the General Post Office in Manhattan, New York City. Plaintiff had insured Vambell's employer against its liability for workmen's compensation, and duly paid Vambell's claim under the New York Workmen's Compensation Law. Vambell, the complaint alleges, failed to commence any action against the United States within one year after the accident, and his inaction operated, according to the New York statute, as an assignment to plaintiff of his cause of action against the United States for the injury.[1] The New York law provides that any

[1] The applicable New York statute is §29 of the New York Workmen's Compensation Law, which provides, in part, the following:

"1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee * * * may take * * * compensation and medical benefits and at any time either prior thereto or within six months after the

recovery obtained by plaintiff must first be applied to reimburse plaintiff for the amount paid as compensation, and of the excess, if any, two-thirds is to be paid to Vambell and one-third retained by plaintiff. On motion of the defendant, the United States, the district court dismissed the complaint.

FRANK, Circuit Judge:

We think the dismissal was error. By the Federal Tort Claims Act,[2] a suit may be maintained against the United States "on any claim * * * for money only * * * on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred [and] * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as

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awarding of compensation, * * * pursue his remedy against such other * * * If such injured employee * * * desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation * * * and in any event before the expiration of one year from the date such action accrues. * * *

"2. If such injured employee * * * has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other * * * to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such * * * person, association, corporation or carrier, as such an assignee, recover from such other * * * a sum in excess of the total amount of compensation awarded to such injured employee * * * and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee * * * two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee. * * *"

[2] 60 Stat. 843, 28 U. S. C. §931 (a), as it read at the time this action was commenced. The new Judicial Code, effective September 1, 1948, makes immaterial amendments in the wording of the statute. 28 U. S. C. §§ 1346(b), 2674.

a private individual under like circumstances * * *" There are certain express exceptions admittedly inapplicable here. The purposes of the Act were two: (1) to end the injustice visited upon persons injured by the torts of employees of the United States, and left without remedy other than an appeal to Congress, and (2) to relieve Congress of the burden of passing upon thousands of private claims presented to it. The latter object was emphasized by the passage of the Tort Claims Act as part of the Legislative Reorganization Act, intended to reform Congressional procedure to allow Congressmen more time for work on national legislation, and by the express provision of that Act forbidding passage of private bills authorizing payment of damages for which suit could be brought under the Tort Claims Act.[3]

The Act contains no mention of claims by subrogees or assignees, but, as Judge Medina has pointed out,[4] Congress had repeatedly acted upon the claims of insurance-company subrogees, and the compelling reasons which led to the enactment of the Tort Claims Act for claims presented by injured individuals apply equally where the claimant is a subrogee or assignee of plaintiff's type.

Were the United States a private person, plainly it would be liable to the plaintiff in the circumstances alleged in the complaint. Defendant's arguments, in effect, rest on the following basis: (1) The United States enjoys immunity from suit without its consent, since it is a successor to the English crown, and therefore to the doctrine that the monarch can do not wrong. (2) This doctrine—long ago severely criticized by Mr. Justice Wilson in *Chisholm* v. *Georgia*, 2 Dall. 419, 453—is so important and stubborn that any consent given by the United States (as a sort of monarch) must be construed in as niggardly fashion as possible.

On this basis—which we regard as untenable in the light of the language and purpose of the statute[5]—defendant urges that the plaintiff, suing in part for reimbursement for compensation paid, failed to bring its claim within the requirement that it be "on account of personal injury"; in other words, since neither the plaintiff nor its property was injured, this could not be a personal injury action.

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[3] Legislative Reorganization Act of 1946, § 131, 60 Stat. 831. The background of the Act has elsewhere been fully discussed. See *The Federal Tort Claims Act*, 56 Yale L.J. (1947) 534; Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 Col. Law Rev. (1947) 722; *Federal Tort Claims Act*, 42 Ill. Law Rev. (1947) 344.

[4] *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 853.

[5] We consider both, of course; for we do not proceed on the principle that a court is to look at the statute only if its legislative history is ambiguous.

We cannot accept this narrow interpretation of the Act. Plaintiff's claim is founded on, limited by, and substituted for, Vambell's claim for personal injury. In particular, the state statute provides that, upon the failure of the injured employee to bring the action, "*the* cause of action" shall by operation of law be assigned to the insurance "carrier." Although as between Vambell and the plaintiff the final settlement may not be the same as if Vambell had brought the action, so far as the United States is concerned, the cause of action is one.

We reject, as the district court did, the suggestion that the assignment—as the New York statute calls this transfer—is void because not executed in accordance with the Federal Assignment Act.[6] That Act does not apply to involuntary assignments.[7] What is more, the assignment in this case is not voluntary: the claim passed to plaintiff, regardless of Vambell's intent or even of his knowledge that, by delaying, he lost his rights, except to share in any recovery that the insurance company may get, if it chose to sue. Moreover, even if the assignment were otherwise within the Assignment Act, we think the language and purpose of the Tort Claims Act more than sufficient to carve out an implied exception for this type of claim.

A more serious contention raised by the Government is that, if actions by assignees are permitted, the government will lose its privilege of interposing a counterclaim against the employee. Although we do not know whether the government intends to assert a counterclaim in this case,[8] we cannot reserve consideration of this argument until a case arises involving a counterclaim; we think Congress did not intend to make the "involuntary" assignee's right to sue dependent upon the government's assertion or non-assertion of a counterclaim against the employee.

The Act specifically confers jurisdiction on the district courts over any "counterclaim, claim or demand whatever on the part of the United States against any plaintiff commencing an action" under the Act,[9] thus providing for claims against the actual plaintiff; while by ordinary rules of court claims arising out of the same transaction may be offset. It is argued that, if the government wants to assert an unrelated counterclaim against the employee or seek from him more than the amount recoverable by

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[6] R. S. § 3477, 31 U. S. C. § 203.

[7] *Goodman* v. *Niblack*, 102 U. S. 556; *Erwin* v. *United States*, 97 U. S. 392; *Price* v. *Forrest*, 173 U. S. 410.

[8] The case is before us on a motion to dismiss, made before answer and thus before the government indicated whether it would make a counter-claim.

[9] 28 U. S. C. § 1346(c).

the plaintiff, allowing this action might force the Government to bring a separate suit and *pro tanto* its right of counter-claim against the original claimant would be lost;[10] that is to say, to give full effect to this favored situation of the government, we must override as to subrogees and involuntary assignees the direction that we must treat the United States as we would a private individual.[11] We think, however, that the reiterated requirement that we should treat the United States like a private individual is the more fundamental, and the Congress did not intend to limit the jurisdiction of the district courts more than it is limited by the specific exceptions.

The other arguments of the government are less impressive. Assignment of the cause of action may permit venue in a district other than that in which the original claimant could properly have brought the action. If Congress did not intend that result, it has not expressed its intention. The administrative problem of preventing suits by two persons for the same injury is difficult but it does not appear to be insurmountable; and, in the present case, at any rate, there is no chance of two suits, since the plaintiff must prove as part of his cause of action that the employee's action is barred.

Plaintiff is the only real party in interest. The New York statute gives it alone the right to sue, even though it may have to account for part of the recovery to the injured employee. To the extent the plaintiff must turn over its recovery to another, it is a "party authorized by statute" to sue in its own name, expressly designated the "real party in interest" by Rule 17. None of the

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[10] We do not believe that this will in fact be a frequent occurrence; if the government will probably assert a counterclaim for more than the amount recoverable, we suspect that neither the injured person nor the insurer is likely to bring the action. Of course the government may assert a counterclaim arising out of the same transaction to the extent of the plaintiff's recovery. Clark, *Code Pleading* (2d ed. 1947) 679-682.

[11] It is perhaps arguable that, where the Government asserts a counter-claim in excess of the claim against it, the action must be dismissed if the original claimant is more than a necessary, but is an indispensable party under Rule 19 and cannot be joined; or it may be urged that permissive joinder under Rule 20 could be used by the government. We need not here consider those arguments.

cases cited by the Government[12] involved plaintiffs so clearly authorized by statute to bring the action.

Since the Tort Claims Act gives the district court discretion to determine whether attorney's fees should be allowed to plaintiff's counsel,[13] there is no danger of excessive fees being granted plaintiff's attorney. The district court, of course, may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses.

Reversed and Remanded.

L. HAND, Circuit Judge (concurring in part):

I see no necessity for passing upon the question whether this action would lie at all, if the United States suggested that it had a counterclaim against Vambell. In that event it might have to sue twice upon the counterclaim, for nobody supposes that it can do more than use it against the plaintiff at bar as a set-off. Nor can we limit this possibility to cases where the counterclaim exceeds the main claim, for that may be entirely defeated and when it is, no part of the counterclaim will have been paid in the main action. I do not mean to suggest that I have any present opinion as to whether the phrase—"under circumstances where the United States, if a private person, would be liable"—should be held to overbear §1346 (c), relating to counterclaims. I have no such opinion, but in general I believe that courts should decide no more than is necessary to the disposal of the case before them. One never knows how differently upon another presentation the issue may appear; and, though it may be a confession of weakness, I can only say for myself that, after I have found enough on which to rest my decision, I feel a decided slackening of responsibility if I go further.

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[12] *Dayton Veneer & Lumber Mills* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 1 F. R. D. 444; *Lloyd, Moore, Inc.* v. *Schwartz*, 26 F. Supp. 188; *Par-X Uniform Service Corp.* v. *Emigrant Industrial Savings Bank*, 268 App. Div. 699, 53 N. Y. S. (2d) 16.

[13] 28 U. S. C. § 2678.

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of November one thousand nine hundred and forty-eight.

Present: Hon. LEARNED HAND, Chief Judge, Hon. CHARLES E. CLARK, HON. JEROME N. FRANK, Circuit Judges

AETNA CASUALTY & SURETY CO., PLAINTIFF-APPELLANT,

v.

UNITED STATES, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York.

This Cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

[Endorsed:] United States Court of Appeals, Second Circuit. 25. Aetna Casualty & Surety Co. v. United States. Judgment. United States Court of Appeals, Second Circuit. Filed Nov. 4, 1948. Alexander M. Bell, Clerk.

United States of America, Southern District of New York

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 39, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Aetna Casualty & Surety Co., plaintiff-appellant, against United States of America, Post Office Department, defendant-appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern

District of New York, in the Second Circuit, this 17th day of December in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the said United States the one hundred and seventy-third.

(S.) ALEXANDER M. BELL,
Clerk.

[SEAL]

17 U. S. GOVERNMENT PRINTING OFFICE: 1949 818367

Supreme Court of the United States

No. —, October Term, 1948

THE UNITED STATES OF AMERICA, PETITIONER

vs.

AETNA CASUALTY & SURETY COMPANY

Order extending time to file petition for writ of certiorari

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 4th, 1949.

(Signed) ROBERT H. JACKSON,
Associate Justice of the Supreme Court of the United States.

Dated this 28th day of January 1949.

824810—49

39 Supreme Court of the United States

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

845286—49——3

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 36

THE UNITED STATES OF AMERICA, PETITIONER

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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845282—49——1

"A" [Caption omitted.]

1 In The United States District Court For The District of New Mexico

Pleas and proceedings before The Honorable Colin Neblett, United States District Judge for the District of New Mexico, presiding in the following entitled cause:

DONALD E. HARDING and WORLD FIRE AND MARINE INSURANCE COMPANY, a corporation, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

No. 1208.—Civil

Complaint

Filed April 7, 1947

I

This action arises under Public Law 601, Chapter 753, Title IV, Federal Tort Claims Act.

II

The plaintiff, Donald E. Harding, is a resident of New Mexico, and the plaintiff, The World Fire and Marine Insurance Company is a corporation, incorporated under the laws of the State of Connecticut and is duly authorized to carry on the business of automobile insurance in the State of New Mexico.

III

On th 2nd day of January 1947, at approximately 12:30 P.M., on Highway No. 12 of the State of New Mexico, 1½ miles North of Aragon, New Mexico, the defendant's agent, Ben Kemp, negligently drove a motor vehicle into a motor vehicle to wit: GMC 1½ ton truck owned by the plaintiff, Donald E. Harding, driven by its agent, Glen McCarty.

IV

At the time of the aforementioned negligent act the defendant's agent, the said Ben Kemp, was an employee of the United
2 States Government, Department of Interior, Forest Service and was acting within the scope of his employment while

driving a motor vehicle owned by the United States of America, Forest Service. The defendant, if a private person, would have been liable to the plaintiffs for such damage as hereinafter described.

V

As a result of the aforementioned negligence of the defendant, the plaintiffs herein suffered damages of $1,484.50 in the following particulars:

a. In the amount of $884.50 for repairing and towing the said 1½ ton truck owned by the plaintiff, Donald E. Harding.

b. In the amount of $600.00 for loss of use of said 1½ ton truck owned by the plaintiff, Donald E. Harding.

VI

Under and pursuant to a policy of collision insurance issued to the plaintiff Harding by the plaintiff corporation, the plaintiff corporation has been legally obligated to pay and has paid to the plaintiff Harding, or on his account, the amount of the repairs and towing bill specified above in subparagraph 5-a hereof, less the deductible amount of $100.00 provided by said policy. By reason of such payment and pursuant to said policy, plaintiff corporation has been subrogated to the claim of the plaintiff Harding for the accident and damage above referred to, to the extent of $784.50.

Wherefore, the plaintiffs pray as follows:

1. That the plaintiff, Donald E. Harding, do have and recover from the defendant, The United States of America, Department of Interior, Forest Service, the sum of $700.00.

2. That the plaintiff, The World Fire and Marine Insurance Company, a corporation, do have and recover from the defendant, The United States of America, Department of Interior, Forest Service, the sum of $784.50.

3 3. That the plaintiffs recover all costs herein and such other and further relief as to the Court may seem proper.

RODEY, DICKASON & SLOAN,
By W. A. SLOAN,
Attorneys for the plaintiffs.

In United States District Court

Amended motion to dismiss

Filed Oct. 20, 1947

Comes now the United States of America, defendant herein, by and through Everett M. Grantham, United States Attorney for the District of New Mexico, and respectfully shows to the Court:

I

That under the complaint of the plaintiff, World Fire and Marine Insurance Company, a corporation, it appears from the face of the pleading that the claim of the coplaintiff against the United States of America has been assigned to the World Fire and Marine Insurance Company, a corporation.

II

That under Sec. 203, Title 31, U.S.C.A., such a purported transfer for assignment of the claim of the said Donald E. Harding against the United States of America to the World Fire and Marine Insurance Corporation is null and void and of no effect.

III

That the plaintiff, Donald E. Harding, has no interest in the present suit and is not the real party in interest.

IV

That in this case the real party in interest is the subrogee or assignee, the World Fire and Marine Insurance Company, a corporation, who may not maintain this suit for his own benefit in any form.

Wherefore, the said defendant prays that the Court enter
4 its order mismissing the complaint of the said plaintiff, World Fire and Marine Insurance Company, a corporation.

EVERETT M. GRANTHAM,
United States Attorney.
By ALBERT H. CLANCY,
Assistant U. S. Attorney.

In United States District Court

Response to amended motion to dismiss

Filed Nov. 3, 1947

The plaintiffs, Donald E. Harding and World Fire and Marine Insurance Company, for their response to the defendant's Amended Motion to Dismiss, respectfully show to the Court:

1. That the assignment of the claim of plaintiff, Donald E. Harding, against the defendant to the plaintiff, World Fire and Marine Insurance Company, is not null and void under Title 31 U.S.C.A., Sec. 203, for the reason that said assignment is non-voluntary and arises out of operation of law.

2. That plaintiff, Donald E. Harding, has an interest and claim against the defendant in the present suit in the amount of $700.00 as set forth in the complaint herein.

3. That the plaintiff, World Fire and Marine Insurance Company, is entitled to maintain this suit under Title 28 U.S.C.A., Sec. 931 (Federal Tort Claims Act), for the following reasons:

(a) It has suffered "Damage or loss of property" in the amount of $784.50, paid to plaintiff, Donald E. Harding, as a result of the negligence of an employee of the defendant while acting within the scope of this employment.

(b) The defendant "if a private person would be liable" to the plaintiff, World Fire and Marine Insurance Company, in the amount of $784.50.

(c) That a claim by a subrogee is not listed in Title 28
5 U.S.C.A., Sec. 943, said section containing the list of claims which are excluded under the Federal Tort Claims Act.

Wherefore, the plaintiffs pray that the defendant's Amended Motion to Dismiss be denied.

RODEY, DICKASON & SLOAN,
By PEARCE C. RODEY,
Attorneys for Plaintiffs.

In United States District Court

Order denying amended motion to dismiss

Filed Nov. 5, 1947

And now this cause coming on for hearing upon the defendant's amended motion to dismiss, the plaintiffs appearing by their attorneys, Rodey, Dickason & Sloan, and the defendant appearing by the U. S. Attorney for the District of New Mexico, the Court having heard the arguments of counsel and being fully advised in the premises, finds:

That defendant's Amended Motion to Dismiss should be denied.

Wherefore, it is hereby ordered, adjudged and decreed that the defendant's Amended Motion to Dismiss filed herein be and the same is hereby denied, to which the defendant objects and excepts.

COLIN NEBLETT, *District Judge.*

OK:
EVERETT M. GRANTHAM, *U. S. Attorney.*

In United States District Court

Amended answer

Filed Dec. 5, 1947

Comes the defendant, United States of America, by and through Everett M. Grantham, United States Attorney for the District of

New Mexico, and for its amended answer to the complaint of the plaintiffs herein, alleges:

I

Defendant admits the allegations of Paragraph I of the complaint.

6 II

Defendant admits the allegations of Paragraph II of the complaint.

III

Answering Paragraph III of the complaint, the defendant admits the allegations thereof except the said defendant denies that there was any negligence on the part of the defendant's agent, Ben Kemp.

IV

Answering Paragraph IV of plaintiff's complaint, defendant admits the allegations thereof except the defendant denies that there was any negligent act on the part of defendant's agent, Ben Kemp.

V

Answering Paragraph V of plaintiff's complaint the defendant denies each and every allegation contained therein and denies that plaintiff, Donald E. Harding, suffered any damage by reason of any negligent act of the defendant's agent.

VI

Answering Paragraph VI of the complaint, the defendant does not have sufficient knowledge or information to admit or deny the allegations contained therein. However, the defendant alleges that if the plaintiff corporation has paid to Donald E. Harding any sum of money under a policy of insurance, the said insurance company did not thereupon become subrogated to the claim of the said Donald E. Harding for the reason that the Federal Tort Claims Act does not authorize maintenance of suits by an assignee or subrogee, and that any rights created under the said Federal Tort Claims Act are personal to the said Donald E. Harding; and for the further reason that any purported assignment or subrogation of the claim of the plaintiff Harding against the United States of America is null and void under the provisions of Section 203, Title 31, U. S. Code, Annotated.

EVERETT M. GRANTHAM,
United States Attorney.

7 In United States District Court

Defendant's requested findings of fact and conclusions of law with the Judge's endorsement of refusal

Filed March 16, 1948

Comes the defendant, United States of America, and requests the Court to make the following findings of fact:

1. The accident in question occurred on an unpaved, icy road, approximately 20 feet in width. The drivers of each vehicle involved first saw the other vehicle when the two vehicles were approximately 100 yards apart; each vehicle was then near the center of the road, and each was traveling at the approximate rate of 25 miles per hour.

2. To the right of defendant's vehicle was an embankment; and to the right of plaintiff Harding's vehicle was an irrigation ditch.

3. When the driver of defendant's vehicle observed plaintiff's vehicle, he turned his vehicle to the right from the center of the road. Plaintiff's truck and trailer, which was more than forty feet long and approximately seven and one-half feet wide, also commenced to turn to it's right hand side of the road, and the truck or tractor part of the vehicle went to the outside edge of the highway, but the trailer did not clear the center of the road so that defendant's vehicle would have room to pass.

4. The driver of defendant's vehicle saw that he would not have room to pass between the embankment and the trailer attached to plaintiff's truck and applied his brakes, causing the defendant's vehicle to skid and go out of control.

5. The driver of plaintiff's vehicle did not apply his brakes and did not succeed in getting the trailer which was attached to his vehicle from the center of the road.

6. The driver of defendant's vehicle at all times was exercising due care and caution.

7. The driver of defendant's vehicle was not negligent and the resulting collision was an unavoidable accident.

8 8. Plaintiff Harding was insured by plaintiff World Fire and Marine Insurance Company, a corporation, and the latter plaintiff paid damages to plaintiff Harding's truck, in the amount of $784.50, and said plaintiff Harding was not damaged in that amount, for the reason that said plaintiff insurance company paid for the repairs to said truck.

9. Plaintiff Harding paid rental on a replacement truck, while his truck was being repaired, in the sum of $600.00 and was allowed the sum of $100.00 by the plaintiff insurance company for

transportation of the damaged truck into Albuquerque, New Mexico, from the scene of the collision.

Based upon the foregoing requested findings of fact, defendant requests the adoption of the following conclusions of law:

1. Plaintiffs are not entitled to recover in any amount, because of the lack of negligence on the part of defendant's driver and because the accident was unavoidable.

2. As a matter of law, plaintiff World Fire and Marine Insurance Company, a corporation, is not entitled to be subrogated to the rights of plaintiff Donald E. Harding.

3. Defendant is entitled to judgment in this case.

Respectfully submitted,

EVERETT M. GRANTHAM,
United States Attorney.

Refused.

COLIN NEBLETT, *U. S. District Judge.*

In United States District Court

Plaintiff's requested findings of fact

The plaintiffs respectfully request the Court to make the following findings of fact:

1. This action arises under Public Law 601, Chapter 753, Title 4, Federal Tort Claims Act.

2. The plaintiff Donald E. Harding is a resident of the State of New Mexico, and the plaintiff World Fire and Marine Insurance Company is a corporation incorporated under the laws of the State of Connecticut and is duly authorized to carry on the business of automobile insurance in the State of New Mexico.

3. On the 2nd day of January 1947, at approximately 12:30 P. M. on U. S. Highway No. 12 in the State of New Mexico, one and one-half miles north of Aragon, New Mexico, Benjamin W. Kemp, the duly authorized agent of the United State of America, negligently drove a motor vehicle into a motor vehicle owned by the plaintiff Donald E. Harding.

4. At the time of the afore-mentioned negligent act, Benjamin W. Kemp was an employee of the United States Government, Department of the Interior, Forrest Service, and was acting within the scope of his employment while driving a motor vehicle owned by the United States of America.

5. The defendant United States of America, if a private person, would have been liable to the plaintiffs for such damage as was occasioned by said accident.

6. As a result of the afore-mentioned negligence of the defendant's agent, the plaintiff Donald E. Harding suffered damages of One Thousand Four Hundred Eighty-four Dollars and Fifty Cents ($1,484.50) in the following particulars:

(a) In the amount of Eight Hundred Eighty-four Dollars and Fifty Cents ($884.50) for the necessary repairs and towing of the motor vehicle of the plaintiff Donald E. Harding, resulting from said accident.

(b) In the amount of Six Hundred Dollars ($600.00) for the loss of use by the plaintiff Harding of the vehicle of the plaintiff Harding for a period of thirty days, the reasonable rental value of said vehicle being Twenty Dollars ($20.00) per day.

7. Under and pursuant to a policy of collision insurance issued to the plaintiff Harding by the plaintiff World Fire and Marine Insurance Company, a corporation, said corporation legally obligated to pay and has paid to the plaintiff Harding, or on his account, the amount of repairs and towing bills specified above, less the deductible amount of One Hundred Dollars ($100.00) provided by said policy of collision insurance.

8. By reason of such payment and pursuant to said policy the plaintiff corporation has been subrogated to the claim of the plaintiff Harding for the damages above referred to to the extent of Seven Hundred Eighty-four Dollars and Fifty Cents ($784.50).

9. The plaintiff Donald E. Harding is entitled to a judgment against the defendant in the amount of Seven Hundred Dollars ($700.00).

10. The plaintiff World Fire and Marine Insurance Company is entitled to a judgment against the defendant in the amount of Seven Hundred Eighty-four Dollars and Fifty Cents ($784.50).

11. The plaintiff World Fire and Marine Insurance Company is entitled to a further judgment for its costs herein in the amount to be taxed by the clerk.

RODEY, DICKASON & SLOAN,
By W. A. SLOAN,
Attorneys for Plaintiffs.

In United States District Court

Order adopting plaintiffs' requested findings

Filed April 21, 1948

It appearing to the Court that judgment herein was entered on March 16, 1948, and that through oversight the Plaintiffs' requested findings of fact and conclusions of law were not filed at that time, and that such requested findings and conclusions have now been tendered:

Now, therefore, it is ordered by the Court that such requested findings of fact and conclusions of law be filed by the Clerk of this Court nunc pro tunc, and that the plaintiffs' requested findings of fact be and they are hereby adopted as the findings and conclusions of the Court, as of March 16, 1948.

11 Dated: Santa Fe, New Mexico, this 21st day of April, 1948.

COLIN NEBLETT, *District Judge.*

In United States District Court

Judgment

Filed March 16, 1948

The above entitled cause coming on for trial upon the merits before the Court; the plaintiffs appearing by their attorneys, Rodey, Dickson & Sloan and Jackson G. Akin; the defendant, United States of America, appearing by Everett M. Granthan, Federal District Attorney for the District of New Mexico; and the Court having heard the testimony of witnesses and the arguments of counsel, being fully advised in the premises, having found the issues in favor of the plaintiffs and against the defendant and having ascertained the amount of damages of the plaintiffs to be on behalf of the plaintiff Donald E. Harding the sum of $700.00 and on behalf of the plaintiff World Fire & Marine Insurance Company the sum of $784.50, and it appearing to the Court that judgment should be entered in accordance with the foregoing findings; thereupon, upon consideration thereof

It is ordered, adjudged, and decreed as follows:

1. That the plaintiff Donald E. Harding to have and recover from the defendant, United States of America, the sum of Seven Hundred Dollars ($700.00).

2. That the plaintiff, World Fire and Marine Insurance Company, a corporation, do have and recover from the defendant, United States of America, the sum of Seven Hundred Eighty-four Dollars and Fifty Cents ($784.50).

3. That the plaintiff, World Fire and Marine Insurance Company, a corporation, do have and recover from the defendant, United States of America, the further sum of Forty-three Dollars and Sixty-four Cents ($43.64), the amount of its costs herein as taxed by the Clerk.

4. That out of and as part of the recoveries heretofore allowed to the respective plaintiffs herein, other than the recovery
12 of costs, there is awarded to Rodey, Dickason & Sloan as

attorneys for the plaintiffs and attorney fee equal to twenty per centum of each of said recoveries.

To all of which the defendant by its attorney objects and excepts.

COLIN NEBLETT,
United States District Judge.

In United States District Court

Notice of appeal

Filed May 11, 1948

Appellant: United States of America.

Appellees: Donald E. Harding and World Fire and Marine Insurance Company, a corporation.

Notice is hereby given that United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on March 16, 1948.

Dated: May 11th, 1948.

EVERETT M. GRANTHAM,
United States Attorney,
Attorney for Appellant,
P. O. Box 1571,
Santa Fe, New Mexico.

Clerk's docket entry re service of copy of notice of appeal

May 11, 1948. Duplicate notice of appeal mailed to Rodey, Dickason and Sloan, Esquires, First National Bank Building, Albuquerque, N. M.

Excerpt taken from Civil Docket No. 34, page 157.

In United States District Court

Appellant's statement of points

Filed May 11, 1948

The defendant, United States of America, relies on the following points in seeking a reversal of the judgment of this Court in the Tenth Circuit Court of Appeals:

13 1. The purported assignment of the claim of plaintiff, Donald E. Harding against the United States to plaintiff World Fire and Marine Insurance Company, a corporation, is void under Section 203, Title 31, U. S. Code Annotated.

2. Under the Federal Tort Claims Act (28 U.S.C.A. No. 931, et. seq.) plaintiff World Fire and Marine Insurance Company, a corporation, may not maintain this suit against the United States

as the assignee or subrogee of plaintiff Donald E. Harding, the right to sue the United States under said Act being personal to said plaintiff Donald E. Harding.

Dated: Santa Fe, New Mexico, this 11th day of May 1948.

EVERETT M. GRANTHAM,
United States Attorney.

Plaintiffs' Exhibit 2

Supplemental Automobile Proof

Policy No. 3002399

Amount of Policy_____. Date of Expiration_____.

Certificate Agency at Albuquerque, N. M.

Sworn statement in proof of loss to World Fire and Marine Insurance Company.

By your policy of insurance above described, you insured Donald E. Harding, (hereinafter called the insured) according to the terms and conditions contained therein against loss occasioned by collision upon the automobile described in said policy as follows:

Model Year 1940.

Trade Name—GMC Truck - 1½ Ton.

Numbers—Series 14806; Motor G22834032.

A loss caused by collision occurred on the 2nd day of Jan. 1947, about the hour of_____the full particulars of which are as follows:

14 The truck had been driven about 200 miles after the collision on Jan. 2 with the U. S. Government Pickup. Between Magdalena and Albuquerque the rear end of the truck began to cause difficulty. When it finally reached Albuquerque it was discovered that the rear axle was badly bent, evidently caused by the blow the truck was struck by the Government vehicle.

The actual cash value of the property described by aforesaid Policy, the other insurance thereon at the time of said loss, the actual loss and damage sustained, and the amount claimed under this Policy are as follows: $152.35 (Statement attached).

There was no other insurance on said automobile except as follows:

The said Automobile at the time of the loss or damage belonged solely to Donald E. Harding and no other person had any interest therein, by chattel mortgage, sale contract, or otherwise, since purchased except as follows:

The said Automobile at the time the loss or damage occurred was being operated by_____Age_____and was being used for the following purposes:

The said loss or damage did not originate by any act; design or procurement on my/our part nor on the part of anyone having

interest in the property insured, or in the said Policy of insurance; nor in consequence of any fraud or evil practice done or suffered by me/us and that no property saved has in any manner been concealed.

It is expressly understood and agreed that the furnishing of this "Proof of Loss" blank to the Assured, or assistance in making up this statement by an Adjuster or any person otherwise an Agent of the Company is an act of courtesy, and is not a waiver of any rights of said Company.

Upon, in the event, and in further consideration of the payment of the above amount by the World Fire & Marine Insurance Company the undersigned hereby agrees that the said Company shall be vested with all rights and causes of action the said undersigned has against any person, persons or Company whomsoever for damages to the insured property, and the undersigned agrees to execute any documents required by said Company in the prosecution of said rights, and the Company is hereby authorized and empowered to sue, compromise or settle in the undersigned's name or otherwise.

Witness my hand at Albuquerque, N. M. this 18th day of March 1947.

DONALD HARDING, *Insured.*

(Certified Correct.)

PAUL P. RUBINCAM, *Adjuster.*

(Certified Correct.)

10-13-48.

Subscribed and sworn to before me this 19th day of March at Albuquerque. Rita Ann Leahy, Notary Public.

Parts—Service Invoice Invoice No. R2632

Inland Motors, Inc.

Distributors

White Motor Company Products

707 No. Broadway Albuquerque, New Mexico Dial 4431

Date February 19, 1947.

Sold to Anderman & Glasebrook, 209 West Gold Avenue, Albuquerque, New Mexico.

Customer's Order No. ------

Terms: Net, 10th of following month.

For repairs made on GMC Truck, Model AC 302, brought into shop by Don Harding on February 14, 1947.

LABOR

Removed and checked rear end, axle housing, and bent axle shafts; renewed one adjusting nut; disassembled and inspected all parts; reassembled and adjusted all parts; renewed side bearing; renewed all thrust washers; renewed 1 axle shaft; road test.

WHITE PARTS

4	41550	Bolt	@ $ .10	$ .40		
8	85X41	Bolt	.12	.96		
4	90425	Washers	.13	.52	Less 15%	$1.60
1	92164	Cone	7.99	7.99	Less 35%	5.19
1	305280	Felt	.17	.17	Less 15%	.14
		Total White Parts				$6.93

ACCESSORIES

1	1661SW	Nut	@ $1.20	$1.20		
2	16676W	Washers	.25	.50	Less 15%	$1.45
1	49422H	Spacer	.51	.51	Net	.51
2	2166097	Axle	9.07	9.07	Net	9.07
1	2044941	Gear & Pinion	40.47	40.47	Net	40.47
		Total Accessories				$51.50

OIL AND GEASE

14 Lbs. Grease @ .20 $2.80 Net $2.80

SUMMARY

Total Labor	$88.13
Total White Parts	6.93
Total Accessories	51.50
Oil and Grease	2.80
	$149.36
State Tax	2.99
	152.35

Certificate of Satisfaction and Authorization to Pay Other Than Assured

(This may also be used when loss is paid to insured and loss payee by agent)

The loss or damage for which this claim is made has been made good to my/our entire satisfaction and I/we hereby release and discharge the World Fire & Marine from all claims and demands for loss or damage which occurred on or about the 2n y of January, 1947, and authorize

payment to Inland Motors, Inc. whose receipt for same shall be a complete acquittance.

Date 3/18/47.

DONALD HARDING, *Assured.*
ALBUQUERQUE NATIONAL TRUST & SAVINGS BANK, *Mortgagee.*

AILEEN GOFF, *Witness.*

The World Fire and Marine Insurance Company
Hartford, Connecticut

Claim No.------
Claim $--------
Claim $--------
Draft $152.35

Payable through Continental Illinois National Bank and Trust Company, Chicago, Illinois.

Supplemental Draft

DENVER, COLO., *March 25, 1947.*

Upon acceptance pay to the order of Inland Motors, Inc. (Donald E. Harding) One Hundred Fifty-two and 35/100 Dollars in full payment and satisfaction of all claims and demands for loss and damage that occurred on January 2, 1947, under Auto Policy No. 3002399—Anderman & Glasebrook, Albuquerque, N. M. Agency and said Policy is reinstated.

BRAERTON, SIMONTON, BROWN, INC.,
(Signature Illegible) *President.*

To The World Fire and Marine Insurance Company, Western Department, Chicago, Illinois.

(Endorsement of Inland Motors, Inc., and bank stamps appear on reverse side of above draft.)

18 *Plaintiff's Exhibit B*

Automobile Proof

Policy No. 3002399 Amount of Policy $1200

Certificate Agency at Albuquerque, N. M.

Date of Expiration 2/5/47

Sworn statement in proof of loss to World Fire & Marine Insurance Co.

By your policy of insurance above described, you insured Donald E. Harding (hereinafter called the insured) according to the terms

and conditions contains therein against loss occasioned by collision upon the automobile described in said policy as follows:

Model Year—1940.
Trade Name—G. M. C.
Type of Body—1½ Ton Truck.
Numbers—Serial 14806; Motor G22834032.
Purchased by Assured Feb. 1946. Used. Actual Cost, Including Equipment—$1200.00.

A loss caused by collision occurred on the 2nd day of Jan. 1947, about the hour of ------ the full particulars of which are as follows:

While traveling northeast one quarter mile north of Aragon, New Mexico, on the highway between Reserve and Datil, the vehicle insured was struck by a U. S. Government Forest Service Chevrolet Pickup proceeding in the opposite direction. This vehicle skidded and struck left front of insured vehicle.

The actual cash value of the property described by aforesaid Policy, the other insurance thereon at the time of said loss, the actual loss and damage sustained, and the amount claimed under this Policy are as follows:

Whole Loss—$732.15.
Amount Deductible—$100.00.
Amount Claimed Under this Policy—$632.15.

19 The said Automobile at the time of the loss or damage belonged solely to Donald E. Harding and no other person had any interest therein, by chattel mortgage, sale contract, or otherwise, since purchased, except as follows:

There was no other insurance on said Automobile, except as follows:

The said Automobile at the time the loss or damage occurred was being operated by Glen McCarty, Age ------ and was being used for the following purposes: Commercial.

The said loss or damage did not originate by any act, design or procurement on my/our part nor on the part of anyone having interest in the property insured, or in the said Policy of insurance; nor in consequence of any fraud or evil practice done or suffered by me/us and that no property saved has in any manner been concealed.

It is expressly understood and agreed that the furnishing of this "Proof of Loss" blank to the Assured, or assistance in making up this statement by an Adjuster or any person otherwise an Agent of the Company is an act of courtesy, and is not a waiver of any rights of said Company.

Upon, in the event, and in further consideration of the payment of the above amount by the World Fire & Marine Insurance Com-

pany the undersigned hereby agrees that the said Company shall be vested with all rights and causes of action the said undersigned has against any person, persons or Company, whomsoever for damages to the insured property, and the undersigned agrees to execute any documents required by said Company in the prosecution of said rights, and the Company is hereby authorized and empowered to sue, compromise or settle in the undersigned's name or otherwise.

Witness my hand at Albuquerque, N. M. this 29th day of January 1947.

DONALD HARDING, *Insured.*

Certified correct.

PAUL P. RUBINCAM, *Adjuster.*

Subscribed and sworn to before me this 29th day of January, 1947 at Albuquerque, N. Mex.

RITA ANN LEAHY,
Notary Public. 10-13-48.

Certificate of Satisfaction and Authorization to Pay Other Than Assured

(This may also be used when loss is paid to insured and loss payee by agent.)

The loss or damage for which this claim is made has been made good to my/our entire satisfaction and I/we hereby release and discharge the World Fire & Marine Ins. Co. from all claims and demands for loss or damage which occurred on or about the second day of January, 1947, and authorize payment to Gatewood Brothers whose receipt for same shall be a complete acquittance.

Date January 29, 1947.

DONALD E. HARDING, *Assured.*
(Illegible) *Mortgagee.*

AILEEN GOFF, *Witness.*

The World Fire and Marine Insurance Company, Hartford, Connecticut

Claim No.------
Claim $------
$------
Draft $632.15

DENVER, COLORADO, *2-6-47.*

Payable through Continental Illinois National Bank and Trust Company, Chicago, Illinois.

Upon acceptance pay to the order of Gatewood Brothers (Donald E. Harding) Six Hundred Thirty-two and 15/100 Dollars in full payment and satisfaction of all claims and demands for loss

and damage that occurred on January 2, 1947, under Auto
21 Policy No. 3002399—Anderman & Glasebrook Agency, Albuquerque, N. M. and said policy is reinstated.

BRAERTON, SIMONTON, BROWN, INC.
N. SIMONTON, *V. President.*

To The World Fire and Marine Insurance Company, Western Department, Chicago, Illinois.

(Endorsement of Gatewood Brothers and bank stamps appear on reverse side of above draft.)

[Clerk's Certificate to foregoing transcript omitted in printing.]

22 In United States Court of Appeals, Tenth Circuit

Record Entry: Cause Submitted Without Oral Argument

Second Day, November Term, Tuesday, November 30th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard, no one appearing for either party.

Thereupon this cause was submitted to the court without oral argument.

23 In United States Court of Appeals, Tenth Circuit

Judgment

Fourth Day, November Term, Thursday, December 2nd, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of New Mexico and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed on authority of case No. 3701, United States of America vs. The Chicago, Rock Island and Pacific Railway Company, decided by this court on December 1, 1948.

Note re mandate

On January 8, 1949, the mandate of the United States Court of Appeals, in accordance with the judgment of said court, was issued to the United States District Court.

24 [Clerk's Certificate to foregoing transcript omitted in printing.]

25 Supreme Court of the United States

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. —

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

YORKSHIRE INSURANCE COMPANY

No. —

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

THE HOME INSURANCE COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States Court of Appeals for the Third Circuit

Appendix to Appellant's Brief

Docket Entries

July 14, 1947 Complaint of Yorkshire Insurance Company, Ltd., plaintiff vs. United States of America, defendants. Filed July 11, 1947.

Complaint of The Home Insurance Company, plaintiff, vs. United States of America, defendant. Filed July 11, 1947.

July 14, 1947. Notices of Allocation in both cases filed (Trenton). Notices mailed.

Sept. 15, 1947. Notices of Motions to Dismiss Complaints in both cases filed Sept. 12, 1947.

Oct. 22, 1947. Notices of Motions for leave to file Amended Complaints in both cases filed.

Oct. 27, 1947. Hearing on Motions for leave to file Amended Complaints in both cases before Honorable Phillip Forman, Judge. Motions denied.

Hearing on Motions to dismiss both Complaints. Motions granted. Order to be entered (Forman).

Nov. 17, 1947. Order dismissing Complaints without costs. Filed Nov. 14, 1947 (Forman). Copy mailed to Frankel and Frankel, for plaintiffs.

Feb. 13, 1948. Notice of Appeal filed in both cases. Bond for costs on appeal filed. Copies of Notice of Appeal mailed to Clerk of U. S. C. C. A. and Edgar H. Rossbach for United States of America.

Mar. 24, 1948. Stipulation as to record on Appeal filed March 23, 1948. Transcript of Record on Appeal filed with Clerk of U. S. C. C. A.

2 In the District Court of the United States for the District of New Jersey

Civil Action No. 10417. Complaint

YORKSHIRE INSURANCE COMPANY, LTD.,

vs.

THE UNITED STATES OF AMERICA

Complaint

Filed July 11, 1947

—. This action arises against the United States of America under the Federal Tort Claims Act, August 2, 1946, Public Law 601, 79th

Congress (Second Session), Chapter 753, Section 401, et seq., as hereinafter more fully appears.

2. Plaintiff is a corporation with offices at 90 John Street, New York, N. Y. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

3. On February 18, 1945, John Doe (said name being fictitious and the correct name being unknown to the plaintiff), an employee of the United States of America, acting within the scope of his employment as an enlisted man in the United States Navy,
3 negligently refueled an oil burner with gasoline, causing serious and substantial damage by fire to premises owned by Emma R. Stuart, 202 Seventh Avenue, Asbury Park, New Jersey, and leased to the United States Navy, which premises were insured against loss by fire by the plaintiff herein.

4. As a result of the negligence of the United States of America by its employee, John Doe (said name being fictitious and the correct name being unknown to the plaintiff), the plaintiff was obliged to pay and did pay to the assured, Emma R. Stuart, the sum of Three Thousand Eight Hundred Forty-Two Dollars and Six Cents ($3,842.06).

5. Plaintiff avers that all of its said losses and damages were caused by the negligence and carelessness as aforesaid of John Doe (said name being fictitious and the correct name being unknown to the plaintiff), an employee of the United States of America, acting within the scope of his employment, by negligently and carelessly refueling an oil burner with gasoline.

Wherefore, plaintiff demands judgment against the United States of America in the sum of Five Thousand ($5,000.00) Dollars and costs.

FRANKEL & FRANKEL,
Attorneys for Plaintiff,
Kinmonth Building,
Asbury Park, New Jersey.

4 In the District Court of the United States for the District of New Jersey

Civil Action No. 10418. Complaint

THE HOME INSURANCE COMPANY,

vs.

THE UNITED STATES OF AMERICA

Complaint

Filed July 11, 1947

1. This action arises against the United States of America under the Federal Tort Claims Act, August 2, 1946, Public Law 601, 79th

Congress (Second Session), Chapter 753, Section 401, et seq., as hereinafter more fully appears.

2. Plaintiff is a corporation of the State of New Jersey. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

3. On February 18, 1945, John Doe (said name being fictitious and the correct name being unknown to the plaintiff), an employee of the United States of America, acting within the scope of his employment as an enlisted man in the United States Navy,
5 negligently refueled an oil burner with gasoline, causing serious and substantial damage by fire to premises owned by Emma R. Stuart, 202 Seventh Avenue, Asbury Park, New Jersey, and leased to the United States Navy, which premises were insured against loss by fire by the plaintiff herein.

4. As a result of the negligence of the United States of America by its employee, John Doe (said name being fictitious and the correct name being unknown to the plaintiff), the plaintiff was obliged to pay and did pay to the assured, Emma R. Stuart, the sum of Four Thousand Three Hundred Fifty-Four Dollars and Thirty-Four Cents ($4,354.34).

5. Plaintiff avers that all of its said losses and damages were caused by the negligence and carelessness as aforesaid of John Doe (said name being fictitious and the correct name being unknown to the plaintiff), an employee of the United States of America, acting within the scope of his employment, by negligently and carelessly refueling an oil burner with gasoline.

Wherefore, plaintiff demands judgment against the United States of America in the sum of Five Thousand ($5,000.00) Dollars and costs.

FRANKEL & FRANKEL,
Attorneys for Plaintiff,
Kinmonth Building,
Asbury Park, New Jersey.

6 United States District Court, District of New Jersey

Civil Action No. 10417. Notice

YORKSHIRE INSURANCE COMPANY, LTD., PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Notice of Motion to Dismiss

Filed Sept. 12, 1947

To Frankel & Frankel, Esquires, Kinmonth Building, Asbury Park, New Jersey:

Take notice that on September 22, 1947, the defendant, the United States of America, by its attorney, Edgar H. Rossbach,

United States Attorney for the District of New Jersey, will move before the Honorable Phillip Forman sitting in the District Court of the United States at the Federal Building, Trenton, New Jersey, at 10:00 o'clock in the forenoon, to dismiss the complaint of the plaintiff on the grounds that the Federal Tort Claims Act
7 does not permit suit on derivative claims and further that this suit is in violation of the Anti Assignment Statute, 31 U. S. C. A., Section 203.

EDGAR H. ROSSBACH,
United States Attorney.
By JOHN A. WALDRON,
Assistant United States Attorney.

United States District Court, District of New Jersey

Civil Action No. 10417. Motion

YORKSHIRE INSURANCE COMPANY, LTD., PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Motion to Dismiss

Filed Sept. 12, 1947

To Frankel & Frankel, Esquires, Kinmonth Building, Asbury Park, New Jersey:

The defendant, the United States of America, by its attorney, Edgar H. Rossbach, United States Attorney for the District
8 of New Jersey, moves the Court to dismiss the complaint of the plaintiff, for that:

1. The Federal Tort Claims Act under which the plaintiff brings this action does not permit derivative suits.

2. This cause of action is prohibited by the words of the Anti Assignment Statute, 31 U. S. C. A., Section 203.

EDGAR H. ROSSBACH,
United States Attorney.
By JOHN A. WALDRON,
Assistant United States Attorney.

9 United States District Court, District of New Jersey

Civil Action No. 10418. Notice

THE HOME INSURANCE COMPANY, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Notice of Motion to Dismiss

Filed Sept. 12, 1947

To Frankel & Frankel, Esquires, Kinmonth Building, Asbury Park, New Jersey:

Take notice that on September 22, 1947, the defendant, the United States of America, by its attorney, Edgar H. Rossbach, United States Attorney for the District of New Jersey, will move before the Honorable Phillip Forman sitting in the District Court of the United States at the Federal Building, Trenton, New Jersey, at 10:00 o'clock in the forenoon, to dismiss the complaint of the plaintiff on the grounds that the Federal Tort Claims Act does not permit suit on derivative claims and further that this suit is in violation of the Anti Assignment Statute, 31 U. S. C. A., Section 203.

EDGAR H. ROSSBACH,
United States Attorney.
By JOHN A. WALDRON,
Assistant United States Attorney.

10 United States District Court, District of New Jersey

Civil Action No. 10418. Motion

THE HOME INSURANCE COMPANY, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Motion to Dismiss

Filed Sept. 12, 1947

To Frankel & Frankel, Esquires, Kinmonth Building, Asbury Park, New Jersey:

The defendant, the United States of America, by its attorney, Edgar H. Rossbach, United States Attorney for the District of New Jersey, moves the Court to dismiss the complaint of the plaintiff, for that:

1. The Federal Tort Claims Act under which the plaintiff brings this action does not permit derivative suits.

2. This cause of action is prohibited by the words of
11 the Anti Assignment Statute, 31 U. S. C. A., Section 203.

EDGAR H. ROSSBACH,
United States Attorney.
By JOHN A. WALDRON,
Assistant United States Attorney.

United States District Court, District of New Jersey

Civil Action No. 10418. Order

YORKSHIRE INSURANCE COMPANY, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Civil Action No. 10418. Order

THE HOME INSURANCE COMPANY, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Order of Dismissal

Nov. 14, 1947

This cause having heretofore come before the Court on motion of the defendant, the United States of America, to dismiss
12 the complaints of the plaintiffs, and on motions of the plaintiffs to amend the complaints, and the motions having been heard on October 27, 1947 and submitted for decision, and it appearing to the Court that the Federal Tort Claims Act does not expressly grant consent to suit by the subrogee of a claimant and that consent of the government to be sued being a relinquishment of sovereign immunity, must be strictly interpreted, and it further appearing that the plaintiff's motions to substitute new party plaintiffs comes out of time,

It is, on this 13 day of November, 1947, therefore, by the Court, Ordered, Adjudged and Decreed that the motions to dismiss above referred to, filed on behalf of the defendant, be and are hereby sustained, and these actions are dismissed and the motions to amend the complaints above referred to, filed on behalf of the plaintiffs, are hereby denied;

To all of which findings, rulings, orders and decrees of the Court plaintiffs excepts, and their exception is allowed.

FORMAN,
United States District Judge.

We hereby consent to the entry of the above order as to form only.

FRANKEL & FRANKEL,
Kinmonth Building,
Asbury Park, New Jersey.

13 United States Court of Appeals for the Third Circuit

No. 9616

YORKSHIRE INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

No. 9617

THE HOME INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

Appeals From the Judgments of the District Court of The United States for the District of New Jersey

Argued October 19, 1948

Before Maris, Goodrich and Kalodner, Circuit Judges

Opinion of the Court

Filed November 5, 1948

By Goodrich, Circuit Judge.

The present appeals raise now and interesting questions under the Federal Tort Claims Act, 28 U. S. C. A. § 931 (a), and Rule 17 of the Federal Rules of Civil Procedure.

The basic facts which present the legal point may be taken to be as follows: A property owner suffers injury to his property by fire through negligence of an employee of the United
14 States acting in the course and scope of his employment. An insurance company pays part of the loss to the property owner under a policy issued by it to him. A second insurance company does the same. Whether the two insurance payments cover the entire loss we do not know and no allegation concerning that fact is found in the complaint of either of the appellants. The two insurance companies bring separate actions against the United States in the District Court for the District of New Jersey claiming to be subrogated to the insured's claim against the United States for the damage done to the property.

In each of the actions the United States moved for dismissal on

two grounds. First it said that the Tort Claims Act was not to be interpreted so as to permit the enforcement of rights claimed through subrogation to the position of the person injured.[1] The second ground of the motion was that the actions were prohibited by the Anti-Assignment Act, 31 U. S. C. A. § 203. The defendant's motion prevailed in each case, the District Court putting the decision upon the ground that the Federal Tort Claims Act "does not expressly grant consent to suit by the subrogee of a claimant and that consent of the government to be sued being a relinquishment of sovereign immunity, must be strictly interpreted * * *".

Each insurance company appealed and the two appeals, each presenting identical points, have been argued together. The government abandons the position that it took in the court below. One claiming as a subrogee may, it concedes, sue under the Tort Claims Act and is not precluded by the anti-assignment statute. Since the words of the Tort Claims Act make the United States liable "if a private person would be liable to the claimant for such damage * * *", the concession seems one required by both the wording and purpose of the statute.

The United States now makes objection, however, upon another ground. The force of its objection as applied to these
15 appeals may be illustrated by the following hypothetical case: Suppose a property owner suffers damage by fire to the extent of $11,000 by the negligence of an employee of the United States. Suppose the property owner is insured by ten insurance companies, each for $1,000 and each pays the insured the full amount of the policy issued by it to him. In enforcing the liability imposed by the statute, is the United States to be subjected to eleven suits in possibly eleven different places? The property owner still has $1,000 coming to him and each of the insurance companies is subrogated to the extent of $1,000 to the insured's claim against the tortfeasor. It certainly would be an incongruous result if one tort producing one injury to one piece of property could thus be made the subject matter of eleven suits with a consequent inconvenience to government officers and expense to the taxpayers. Yet if two companies can bring individual actions as subrogees for what they paid in this particular case, it is difficult to see why eight more, if similarly interested, could not do so.

The procedural problem finds its setting in Rule 17 of the Federal Rules of Civil Procedure, requiring that every action be prosecuted in the name of the real party in interest. In the law relating to assignment we have an analogy for subrogation which is in the nature of an assignment by operation of law, although originally the rules concerning the latter subject were developed and applied by

[1] The phrase was: "The Federal Tort Claims Act under which the plaintiff brings this action does not permit derivative suits."

equity courts. At an early day an assignee of a chose in action was permitted to sue in the assignor's name and later was permitted to sue in his own name under real party in interest statutes. But when there were several partial assignees the rule forbidding splitting causes of action prevented them from suing individually. All could join or be joined in one action as parties plaintiff, or the partial assignee could separately intervene in an action by the assignor.[2]

16 The same development is to be found, not without some variations and dissents, with regard to suits of those claiming rights through subrogation.[3] An insurer who has paid an entire loss suffered by the insured is subrogated to his rights. At law he could sue in the name of the insured, in equity or under a real party in interest statute he can sue in his own name.[4]

The problem then arises as to the procedural position of a partial subrogee (insurer) under the Federal Rules. There can be little doubt that his equitable rights in any recovery made by the subrogor (insured) qualify the subrogee as a real party in interest under Rule 17 (a).[5] Both insured and insurer "own" portions

case 2 (D. Ct. N. D. Ohio, 1941); First Nat. Bank of Bloomingdale v. Manufacturers Trust Co., 5 Pike & Fischer Fed. Rules Serv. 17a.141, case 1 (D. Ct. D. N. J. 1941); McWhirter v. Otis Elevator Co., 40 F. Supp. 1 (D. Ct. W. D. S. C., 1941); 2 Moore, Federal Practice § 17.08, p. 2057 (1938).

of the substantive right against the tortfeasor. The only reason for preventing suit by the partial subrogee alone is, as in the case of the partial assignee, to preclude inconvenience and expense to a defendant who might be required to defend a number of separate suits arising out of a single claim, if the rule were otherwise.[6]

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[2] 2 Williston, Contracts § 443 (Rev. ed. 1936); Restatement, Contracts § 156 (1932).

[3] 2 Moore, Federal Practice § 17.08, p. 2049, n. 9 (1938).

[4] See Note, 96 A. L. R. 865 (1935).

[5] Williams v. Powers, 5 Pike & Fischer Fed. Rules Serv. 17a.141,

[6] This reason appears to underlie the concept that one claim can give rise to but one lawsuit, an idea that has resulted in the denial to the partial subrogee or assignee of the right to sue alone in a number of earlier cases. See, e. g., Southern Bell Tel. & Tel. Co. v. Watts, 66 Fed. 460 (C. C. A. 4, 1895); Aetna Ins. Co. v. Hannibal & St. J. R. Co., 1 Fed. Cas. No. 96 (C. C. E. C. Mo. 1874); Regan v. N. Y. & N. E. R. Co., 60 Conn. 124, 22 Atl. 503 (1891); Shawnee Fire Ins. Co. v. Cosgrove, 85 Kan. 296, 116 Pac. 819 (1911); Powell & Powell v. Wake Water Co., 171 N. C. 290, 88 S. E. 426 (1916); London Assurance Co. v. Sainsbury, 3 Doug. 245 (1783).

It is, therefore, clear that the rule of one claim, one lawsuit, is for the benefit of the defendant, and he is the one who should make a timely claim to join the necessary parties.[7] It is a right which may be waived by a defendant, and it has been so held in federal
17 cases applying state procedural codes under the Conformity Act[8] and by state courts.[9] The result has been approved
488 (1889); Gaugler v. Chicago, M. & P. S. Ry. Co., 197 Fed. 79, 83 (D. Ct. D. Mont. 1912).
by secondary authorities and its application urged under the Federal Rules.[10] We think this view is sound and affords a defendant sufficient protection from the embarrassment of numerous lawsuits.

What the United States has thus presented, then, is not a defense upon the merits of the plaintiffs' claim but a procedural rule established for the convenience of it and other defendants similarly situated. And it claims the protection of that procedural rule for the first time upon these appeals. That fact alone does not necessarily prevent its consideration here.[11] But the defense offered does not call for an affirmance upon a procedural ground of a judgment rendered for a substantive reason now abandoned. The United States should have immunity from a multiplicity of suits upon one obligation; but it should pay that obligation if it is found to exist under the statute. It appears that a motion to add further parties

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[7] It is clear that the property owner and other insurers, if any, are necessary parties, since their presence in the lawsuit is required to do complete justice by adjusting all rights. But they are not indispensable in the sense that a final decree cannot be made without affecting their interests or leaving the controversy in such a condition that its final determination is inconsistent with equity. See 2 Moore, Federal Practice, p. 2144 et seq. (1938).

[8] Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473,

[9] Porter v. Lane Const. Co., 212 App. Div. 528, 209 N. Y. Supp. 54 (1925), aff'd 244 N. Y. 523, 155 N. E. 881 (1927); Firemen's Ins. Co. v. Oregon R. R. Co., 45 Ore. 53, 76 Pac. 1075 (1904); Nat. Union Fire Ins. Co. v. Denver & R. G. R. Co., 44 Utah 26, 137 Pac. 653 (1913). See Note, 96 A. L. R. 879, sec. b (1935).

[10] 2 Moore, Federal Practice § 17.08, p. 2057 (1938); 2 Williston, Contracts § 443 (Rev. ed. 1936). See Restatement, Contracts § 156 (1932).

[11] "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." Hormel v. Helvering, 312 U. S. 552, 557 (1941).

was made and dismissed by the District Court for coming out of time. If the property owner is barred by lapse of time and there are no other claimants the defendant need not be subjected to a multiplicity of suits. Rule 42 providing for consolidation is very broad; so is Rule 21 for adding or dropping parties. The liberal provision for amendment in Rule 15 makes possible the allegation of existence or non-existence of other possible claimants.

18 The judgments must therefore be reversed and the cases go back for further proceedings in the District Court. If the plaintiffs can so present their case as to give the defendant the procedural protection it is entitled to, they may then have a chance to prove their case on the merits.

The judgments will be reversed and the cases remanded to the District Court for proceedings not inconsistent with this opinion.

19 United States Court of Appeals, Third Circuit

No. 9616

YORKSHIRE INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court for the District of New Jersey

Present: Maris, Goodrich and Kalodner, Circuit Judges

Judgment

Nov. 5, 1948

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed and the case remanded to the District Court for proceedings not inconsistent with the opinion.

By the Court

HERBERT F. GOODRICH,
Circuit Judge.

November 5, 1948

[File endorsement omitted.]

20 United States Court of Appeals, Third Circuit

No. 9617

THE HOME INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court for the District of New Jersey

Present: Maris, Goodrich and Kalodner, Circuit Judges

Judgment

November 5, 1948

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed and the case remanded to the District Court for proceedings not inconsistent with the opinion.

By the Court

HERBERT F. GOODRICH,
Circuit Judge.

November 5, 1948

[File endorsement omitted.]

21 In the United States Court of Appeals for the Third Circuit

Nos. 9616 and 9617

YORKSHIRE INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

THE HOME INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

Appeal from the Judgment of the United States District Court for the District of New Jersey

Petition of the United States for Rehearing

Filed Nov. 9, 1948

Comes now the United States, appellee in the above-entitled causes, and presents this its petition for rehearing, and in support thereof respectfully shows:

On page 2 of the printed opinion it is stated:

> Each insurance company appealed and the two appeals, each presenting identical points, have been argued together. The government abandons the position that it took in the court below. *One claiming as a subrogee may, it concedes, sue under the Tort Claims Act and is not precluded by the anti-*
22 *assignment statute.* Since the words of the Tort Claims Act make the United States liable "if a private person would be liable to the claimant for such damage * * *," the concession seems one required by both the wording and purpose of the statute. [Italics supplied.]

This, we submit, is a misapprehension of the Government's position. The Government does not concede that a subrogee may sue under the Federal Tort Claims Act and specifically relies upon the anti-assignment statute, among other grounds, in support of its position. The principal point urged by the Government on this appeal was that any action brought against the United States under the Federal Tort Claims Act must be brought in the name of the person who originally sustained the loss and must include the entire claim. On this point the Government argued that the person originally sustaining the loss is the real party in interest under Rule 17 (a) of the Federal Rules of Civil Procedure, that any action brought must be in his name for the entire loss, and that an insurer claiming as partial subrogee cannot maintain an action in its own name against the tort feasor, but must join as an equitable

plaintiff or use plaintiff if it is to be a party to the record at all. In this way, it was argued, in addition to preventing multiplicity of suits, the Government's right of counterclaim against the original claimant was preserved, as contemplated by 28 U. S. C.
23 1346 (c),[1] and the Government was protected from embroilment in conflicting claims and the danger that its rights might be embarrassed by having to deal with several persons instead of one, contrary to the policy of the anti-assignment statute, R. S. 3477, 31 U. S. C. 203, as amended.

While it is true, as the Court has observed in its opinion and as Government counsel acknowledged on oral argument, that the Government was defending, on a procedural ground, a judgment rendered on a substantive ground, this change in position was not intended as, and, we submit, was not a broad concession that "One claiming as a subrogee may * * * sue under the Tort Claims Act and is not precluded by the anti-assignment statute." Instead, the Government's contention always has been that a subrogee may not maintain an action as legal plaintiff under the Tort Claims Act, although different arguments are now being urged in support of that contention.

A modification of the paragraph from the opinion quoted above would not disturb what we conceive to be the basis for this Court's decision, *viz.*, that the property owner and other insurers are necessary but not indispensable parties, and hence their nonjoinder would not justify a dismissal of the actions. We submit that a modification is necessary to make the opinion reflect more accurately the Government's position, in order to prevent any possible prejudice to the Government either in the further proceedings in these actions or in the defense of similar actions in other courts.

24 For the foregoing reasons, petitioner requests that the paragraph quoted above from page 2 of this Court's printed opinion be reexamined and modified.

Respectfully submitted.

H. G. MORISON,
Assistant Attorney General.
ALFRED E. MODARELLI,
United States Attorney,
Newark 1, New Jersey.
PAUL A. SWEENEY,
MASSILLON M. HEUSER,
ALVIN O. WEST,
Attorneys, Department of Justice,
Washington, D. C.

NOVEMBER, 1948.

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[1] See Aetna Casualty & Surety Company v. United States (C. A. 2), No. 25, decided November 4, 1948.

Certificate of Counsel

I, Alvin O. West, counsel for the United States in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay and is believed to be meritorious.

ALVIN O. WEST.

NOVEMBER, 1948.

25 United States Court of Appeals, Third Circuit

No. 9616

YORKSHIRE INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

No. 9617

THE HOME INSURANCE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA

Present: Maris, Goodrich and Kalodner, Circuit Judges

Order Amending Opinion and Denying Rehearing

Dec. 6, 1948

And Now, to-wit, on this 6th day of December, 1948, It Is Ordered: (1) That the second full paragraph on page two of the slip opinion be amended to read as follows:

> "Each insurance company appealed and the two appeals, each presenting identical points, have been argued together. The government does not press the point that it took in the court below."

that the paragraph beginning next to the last line on page 2 become part of the second paragraph and that the first sentence be amended to read:

> "It now makes objection, however, upon another ground."

(2) That the petition for rehearing be and the same is denied.

By the Court,

HERBERT F. GOODRICH,
Circuit Judge.

26 Clerk's Certificate to foregoing transcript omitted in printing.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 822251 994

Supreme Court of the United States.

No. 37—October Term, 1949

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 38—October Term, 1949

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1949

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 617

UNITED STATES OF AMERICA, PETITIONER

v.

AETNA CASUALTY AND SURETY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 4, 1948.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 20-24) is reported at 76 F. Supp. 333. The majority opinion of the United States Court of Appeals for the Second Circuit, and the opinion of Judge Learned Hand, concurring in part (R. 30-35), are reported at 170 F. 2d 469.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1948 (R. 36). On January 28, 1949, this Court granted the United States an extension of time to and including March 4, 1949, within which to petition for certiorari (R. 38). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition of R.S. 3477, 31 U.S.C. 203 against the assignment of claims against the United States, may be invoked by the United States to bar recovery of a judgment against it under the Federal Tort Claims Act, on the claim of an injured person covered by workmen's compensation insurance, where the insurance carrier, which has paid compensation benefits to such person, brings suit in its own name as the assignee under state law of the entire cause of action.

STATUTES INVOLVED

The Federal Tort Claims Act, Sections 1346 (b), 1346 (c), 1402 (b), 2401 (b), 2402, 2412 (c), 2674, 2678, and 2680 of Title 28,[1] United States Code;

[1] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U.S.C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied in the Federal Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.). The citations in this petition

the pertinent provisions of R.S. 3477 as amended, 31 U.S.C. 203; Section 29, Subdivision 1 as amended and Subdivision 2 in pertinent part, of the New York Workmen's Compensation Law are set forth in the Appendix, *infra*, pp. 23-31.

STATEMENT

Peter Vambell, in the course of his employment as a guard and registered mail convoy for the Federal Reserve Bank of New York, was injured on February 8, 1945, on the loading platform of the General Post Office in the Borough of Manhattan, when he was struck by some mail sacks which fell from a conveyor, allegedly through the negligence of the post office employees (R. 4). Vambell filed a claim under the New York Workmen's Compensation Law and was awarded compensation for his injury (R. 5-6). Respondent, Aetna Casualty & Surety Company, the insurance carrier for the Federal Reserve Bank of New York, paid this compensation, together with the medical benefits to which Vambell was entitled (R. 5-6).

Although the injury could have been made the subject of an action under the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842), Vambell did not bring an action against the United States. Respondent, however, on May 28, 1947, brought this action against the United States under the Fed-

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are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act.

eral Tort Claims Act to recover $20,000 as damages for Vambell's injuries, alleging that by operation of the New York Workmen's Compensation Law Vambell's entire cause of action had been assigned to it (R. 6-7). For a second cause of action, respondent alleged that under its policy with the Federal Reserve Bank it had paid $348.67 for medical treatment to Vambell, for which the Bank as his employer was responsible under the New York Workmen's Compensation Law, and asked judgment for this amount as the subrogee of Vambell and his employer (R. 7).

The United States moved to dismiss the complaint on the ground that the Federal Tort Claims Act did not authorize the maintenance of an action by a subrogee or assignee of a cause of action thereunder, and on the further ground that the action was barred by R.S. 3477, 31 U.S.C. 203, which prohibits the assignment of claims against the Government before they are allowed (R. 9-13). The District Court held that R.S. 3477 does not apply to suits under the Federal Tort Claims Act, but sustained the Government's motion to dismiss on the ground that the Act, strictly construed, gave a right of action only to one whose claim arose directly out of damage, loss, injury or death, and did not cover the claim of an assignee (R. 20-24). An order dismissing the complaint was entered on January 22, 1948 (R. 25-26), from which an appeal was taken

by respondent, Aetna Casualty & Surety Company (R. 27).

The United States Court of Appeals for the Second Circuit reversed, holding, in an opinion by Judge Frank, with Judge Learned Hand concurring in part, that the Federal Tort Claims Act is not to be strictly construed, that it permits the assignment by state law of an injured workman's cause of action against the United States, that this assignment was involuntary and hence not prohibited by R.S. 3477, as amended (31 U.S.C. 203), but that even if it were otherwise within the terms of that statute, the Federal Tort Claims Act has carved out an implied exception for this type of claim (R. 30-33). The court also held that Congress intended to permit such assignments, even though they will permit venue in a district where the original claimant could not have brought the action (R. 34). As for the conflict which was pointed out between the provision in the Federal Tort Claims Act limiting attorney fees to 20 percent of the recovery and the provision in the New York Workmen's Compensation Law allowing the insurance carrier as assignee to retain one-third of the amount recovered over and above the amount of the compensation award, medical expenses, and expenses of the action, which include attorney fees, the court below merely stated that "The district court, of course, may consider the fact that the state

statute allows plaintiff a portion of the recovery to cover its expenses" (R. 35). Judge Learned Hand concurred in the foregoing rulings, but expressly reserved opinion as to one further ruling, that the loss of the Government's right of counterclaim against the original claimant through the prosecution of the action by an assignee did not "override * * * the direction that we must treat the United States as we would a private individual," since "Congress did not intend to limit the jurisdiction of the district courts more than it is limited by the specific exceptions [in the Federal Tort Claims Act]" (R. 33-34). Judge Hand could see no necessity for passing upon the question whether this action would lie at all, if the United States had suggested that it had a counterclaim against Vambell (R. 35).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the transfer of Vambell's cause of action to respondent was not subject to the provisions of R.S. 3477.

2. In holding that the assignment of Vambell's cause of action to respondent was an involuntary assignment.

3. In holding that even if the assignment of Vambell's cause of action to respondent were otherwise within the provisions of R.S. 3477, the Fed-

eral Tort Claims Act has carved out an implied exception for this type of assigned claim.

4. In holding that the Federal Tort Claims Act permits the Government's right of counterclaim against a claimant to be defeated through the prosecution of the claimant's cause of action by an assignee under state law.

5. In holding that the Federal Tort Claims Act permits venue in a district other than that in which the original claimant could properly have brought the action, by permitting the cause of action to be prosecuted by an assignee of the original claimant.

6. In failing to hold that there is a conflict between the provision of Section 29, Subdivision 2, of the New York Workmen's Compensation Law allowing the insurance carrier to retain one-third of the excess of any recovery it effects on an injured workman's cause of action, over and above the total amount of compensation awarded, the expenses for medical treatment paid by it, and the reasonable and necessary expenditures incurred in effecting such recovery, which includes attorney fees, and the provision of the Federal Tort Claims Act (28 U.S.C. 2678) limiting to 20 percent of the recovery the compensation to be allowed for prosecuting a claim thereunder.

7. In holding that, with regard to the conflict between the provisions of the Federal Tort Claims Act and Section 29 of the New York Workmen's

Compensation Law relating to the amount allowable as compensation for prosecuting a claim, the district court, in fixing attorney fees, "may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses."

8. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Congress, by the Federal Tort Claims Act, made the United States liable on tort claims "in the same manner and to the same extent as a private individual under like circumstances, * * * " (28 U.S.C. 2674), and gave the district courts jurisdiction of civil actions on "claims against the United States, for money damages, for injury or loss of property, or personal injury or death * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346 (b)). Taken literally and alone, this language places the United States in the shoes of a private person in all respects, making it subject to actions on tort claims by assignee or subrogees whenever such actions are permitted against private persons by state law. We submit that these provisions cannot be so applied for the determination of the issue here presented. Other basic interests of the Government as a defendant are defined and preserved by R.S. 3477. This statute,

which prohibits the transfer or assignment of claims against the United States, rests on broad considerations of federal policy which also require recognition. Failure to apply R.S. 3477 will subject the Government to the possibility of multiple suits resulting from the splitting of a cause of action, will permit venue in a district other than that in which the original claimant could properly have brought the action, will defeat the Government's right of counterclaim against the original claimant, and, where the claim arises out of an injury to a person covered by a workmen's compensation statute, will impose on the prosecution of the claim all the incidents of that statute, even though they may be in conflict with the provisions of applicable federal law.[2]

Avoidance of these difficulties is obviously of great importance to the United States, and may be simply effected by invoking R. S. 3477. The availability of this statute to the United States will impair no substantial rights. If a tort is committed for which the United States is liable, an assignee or subrogee of the original claimant has no great interest at stake in demanding that he be permitted

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[2] The instant case illustrates all but the first of these problems. All of the problems are illustrated by *Yorkshire Insurance Company* v. *United States of America* and *The Home Insurance Company* v. *United States of America*, 171 F. 2d 374 (C. A. 3), and *United States of America* v. *World Fire and Marine Insurance Company*, No. 3715 in the Court of Appeals for the Tenth Circuit, in which the Government is also applying for certiorari.

to recover judgment in his own name. The insurance carriers' contention in this case, and in the related cases in which the Government is applying for certiorari, is entirely technical, consisting of a claimed right to prosecute to judgment in their own names all or part of a cause of action against the United States on which insurance has been paid. There appears to be no reason why the substantial interest of the insurance carriers, their interest in reimbursement out of a possible recovery from the United States, cannot be protected in connection with actions under the Tort Claims Act as that interest has been traditionally protected by the familiar devices of policy cooperation clauses and "borrow and loan" receipts. Cf. *Doleman* v. *Levine*, 295 U. S. 221, 225.

The question thus presented, of great importance to the Government in its administration of the numberless litigations which have arisen and will arise under the Federal Tort Claims Act, does not involve any contention that the Government's waiver of immunity in tort actions, as a matter of substantive right, must be construed "* * * in as niggardly fashion as possible." (R. 32.) In this regard, we believe that the court below has entirely misapprehended the position taken by the Government. Our sole concern is to attain a rule, proper in our view, under which the Government's position as defendant will not be needlessly imperiled or be made unnecessarily difficult without

any general correlative advantage to plaintiffs under the statute. In declining to recognize considerations long accepted as essential to the Government as party defendant under a statute waiving immunity, the holding of the court below is in direct conflict with the result reached by the United States Court of Appeals for the Fifth Circuit in *United States of America* v. *Hill,* 171 F. 2d 404, rendered December 17, 1948, in which that court held that the existence of insurance had no effect on a claim and was irrelevant to the trial of it, and that under R. S. 3477 the United States was entitled to the ascertainment of its liabilities unembarrassed by the existence or consequences of the insurance.[3]

1. Under Section 29, as amended, of the New York Workmen's Compensation Law, Vambell's cause of action was automatically assigned to respondent upon Vambell's failure to commence an action against the United States within nine months after the passage of the Federal Tort Claims Act.[4]

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[3] A rehearing before the Fifth Circuit Court of Appeals *en banc* has been granted in the *Hill* case at the instance of the insurance carrier. The argument has been set for April 15, 1949.

[4] Section 29 formerly provided that the assignment should take place after one year. Since Vambell was injured on February 8, 1945, more than one year had elapsed before the passage of the Federal Tort Claims Act on August 2, 1946. Section 29 was thereafter amended, however, to permit an injured workman to bring an action" * * * not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues."

Admittedly, respondent, as assignee under this statutory assignment, could have maintained an action against a private tortfeasor. It cannot recover in this action against the United States, however, unless this assignment is outside the bar of R. S. 3477. The holding of the court below that R. S. 3477 did not bar the assignment to respondent was based upon two grounds: that the statute did "* * * not apply to involuntary assignments * * *" (R. 33); and that, even if R. S. 3477 did bar the assignment, the Federal Tort Claims Act had carved out an implied exception for the type of claim here involved. We submit that the court below is clearly in error as to both of these suggested grounds.

(a) R.S. 3477 provides that any transfer or assignment of a claim against the United States shall be null and void unless made after the allowance of the claim, the ascertainment of the amount due, and issuance of a warrant for payment. As this Court has observed, "It would seem to be impossible to use language more comprehensive than this." *Spofford* v. *Kirk*, 97 U. S. 484, 488. And it has been held indispensable to the validity of the assertion of an assigned claim against the United States that all statutory requisites have been met. *Spofford* v. *Kirk, supra; United States* v. *Gillis*, 95 U. S. 407; *The John Shilloto Co.* v. *McClung*, 51 Fed. 868, 877 (C. A. 6); *H. M. O. Lumber Co.* v. *United States*, 40 F. 2d 544 (W. D. Mich.). There can be

no doubt that the assignment here involved falls far short of a compliance with any of the requirements of R.S. 3477.

Nor does the assignment here fall within the well-defined exception to the operation of the statute. R. S. 3477 was "* * * passed for the protection of the government * * *", *Hobbs* v. *McLean*, 117 U. S. 567, 576, and was designed to protect the Government from the "* * * danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Co.*, 300 U. S. 588, 594. And in *Goodman* v. *Niblack*, 102 U. S. 556, 560, this Court, although holding the particular assignment there involved to be beyond the purview of the statute, specifically recognized that the statutory language "is broad enough * * * to include transfers by operation of law * * *." Recognizing the function of the statute, this Court has excepted from its bar the instances where, by virtue of an assignment, the United States was enabled to deal with a universal successor, such as a trustee in bankruptcy or assignee for benefit of creditors. *Goodman* v. *Niblack*, 102 U. S. 556; *Erwin* v. *United States*, 97 U. S. 392.[5] In such cases, it is obvious

[5] The reliance which the court puts on these two decisions is clearly misplaced. An additional decision of this Court cited below, *Price* v. *Forrest*, 173 U. S. 410, is not in point. In the *Price* case, the claim had been ascertained and allowed, and the Government occupied the position of stakeholder, indifferent to the outcome of the dispute.

Reference might also here be made to the remark of the court below that the assignment herein was involuntary in

that the interests of the Government will not be endangered by dealing with such a substituted representative in the same fashion that it would deal with the original claimant. It is equally obvious that this is not such a case. On the contrary, this was the assignment of a single claim only, placing it in the hands of an assignee who, under the decision of the court below, is free to prosecute it without being answerable in any respect on any counterclaim which the United States may have against the assignor.[6]

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that the claim passed to respondent under the state statute "* * * regardless of Vambell's intent or even of his knowledge * * *" (R. 33). As shown above, the exception of an assignment from R.S. 3477 is a federal question and derives from the function and policy of that statute, not from any automatic test as to the voluntary or involuntary nature of the transfer. In so far as Vambell's subjective intent under the state statute need be consulted, it is sufficient to note that he chose to receive compensation under the state law and to permit the claim to be transferred to the respondent, a choice which can readily be characterized as volitional.

[6] Although the effect on the New York workmen's compensation system of prohibiting the statutory assignment of claims against the United States can have no bearing on the construction to be given R.S. 3477 as applied to such case, we wish to point out that prohibiting the statutory assignment will not frustrate the public policy of New York to enable workmen's compensation carriers to obtain indemnification from negligent third parties responsible for the injuries for which compensation has been paid. Section 29, Subdivision 1, of the New York Workmen's Compensation Law gives the insurance carrier a lien, to the extent of the compensation and medical expenses paid by it, on any recovery had in an action brought by the injured workman. This is adequate provision for the indemnification of insurance carriers and does not conflict with R. S. 3477, since it operates after the amount of the Government's liability on the claim has already been determined in a proper proceeding. See *Houston* v. *Ormes*, 252 U. S. 469, 474; *Price* v. *Forrest*, 173 U. S. 410. If the injured workman fails or refuses to bring an action, the insurance

(b) As a second ground for holding that the assignment here involved was not barred by R.S. 3477, the court below stated: "* * * we think the language and purpose of the Tort Claims Act more than sufficient to carve out an implied exception for this type of claim." (R. 33). No elaboration of this view was advanced. We submit that any exception to the command of R.S. 3477, so easily found below, must be based on compelling considerations and that no such factors are here present. The purposes of the Tort Claims Act are fully served by permitting the person originally sustaining the loss or injury to maintain a tort action against the United States, without also permitting the cause of action to be transferred to another with an absolute right to recover in his own name. This fact alone is sufficient, we submit, to sustain the Government's position herein, in view of the familiar rule that implied repeals are looked upon with disfavor. *General Motors Corp.* v. *United States*, 286 U. S. 49, 61-62; *United States* v. *Jackson*, 302 U. S. 628, 631; *United States* v. *Borden Corp.*, 308 U. S. 188, 198; *U. S. Alkali Assn.* v. *United States*, 325 U. S. 196, 209.

But we do not need to rest there, as a specific provision of the Tort Claims Act suggests affirmatively that Congress never intended to change the law regarding the assignability of claims against

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carrier should be able to protect its right under the state law by bringing an action in the name of the workman. Cf. *Independent Wireless Co.* v. *Radio Corp.*, 269 U. S. 459.

the United States. In granting the right to sue the United States under the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505), Congress expressly preserved the Government's right of counterclaim. The same provision was adopted by reference in the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, Sec. 411, 60 Stat. 844), and in the new Judicial Code the same section covers both types of actions. 28 U. S. C. 1346 (c), Appendix, *infra*, p. 24. We submit that Congress clearly intended this provision as a further implementation of the same policy of assuring certainty in the Government's position which underlies R. S. 3477.

Both opinions below recognized the Congressional purpose in the Federal Tort Claims Act to protect the Government's right of counterclaim against the original claimant (R. 33-34, 35), but nevertheless adhered to a judgment which has the inevitable result of depriving the Government to a greater or lesser extent, if not entirely, of right. Here, as in connection with all of the considerations which we urge, the court below failed to recognize that the decision of questions of counterclaim, venue, and applicability of federal or state law, automatically flow from the central holding that derivative claimants may as a matter of right recover judgment in their own name under the Tort Claims Act. The justifications offered in the opinions below for the result there reached are, at best,

unrealistic. The majority below expressed an opinion that the loss of the right of counterclaim will not in fact be a frequent occurrence, stating that "If the government will probably assert a counterclaim for more than the amount recoverable, we suspect that neither the injured person nor the insurer is likely to bring the action. * * *" (R. 34). It is immediately apparent that this view contains none of the elements of certainty which should attach to the Government's position in connection with exercise of its right, and falls somewhat short of fair recognition of the Government's needs. The existence of a counterclaim against the original claimant will not necessarily deter his assignee from bringing an action, since he can never be held liable on the Government's counterclaim against the assignor. The majority below also stated that "the government may assert a counterclaim arising out of the same transaction to the extent of the plaintiff's recovery" (R. 34). Analytically, this statement fails entirely to meet the problem presented. The Government is not primarily concerned with set-offs or counterclaims arising out of the same transaction. An action under the statute involves a determination whether the Government has been negligent or not. If negligent, it is liable; if not negligent, there can be no recovery. It is principally in connection with counterclaims or set-offs arising out of other transactions that the right reserved by 28 U. S. C. 1346 (c) becomes

important. Such cross claims are, of course, lost if the derivative claimants are permitted to sue under the statute in their own names. Of equal importance is the fact that the Government cannot enforce a counterclaim for damages for negligence against an assignee plaintiff if it be determined on trial that the tort in question resulted from the negligence of the original claimant, the plaintiff's assignor.[7]

The complex possibilities suggested above contrast unfavorably with the certain and clear result which would follow from an adoption of the plain rule for which we contend, namely, that the United States is free to invoke the provisions of R. S. 3477 as a bar to recovery by derivative claimants under the Federal Tort Claims Act. The same criticism may be levelled at the suggestion made by Judge Hand in his concurring opinion, to the effect that district court jurisdiction over tort claims actions by derivative claimants might fail if the United States, in a particular case, had a counterclaim against the original claimant (R. 35). The protection of the Government's interest should be placed on a basis which permits of over-all administration under the policy of R. S. 3477, and not be left to the discretion of trial courts on a case-by-case basis.

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[7] The problem of venue which is raised by the rulings in this case and in the related cases in which the Government is applying for certiorari is discussed in the petitions in *United States of America* v. *World Fire and Marine Insurance Company*, No. 618, pp. 11-14, and in *United States of America* v. *Yorkshire Insurance Company*, and *United States of America* v. *The Home Insurance Company*, Nos. 619, 620, p. 7.

Thus, if the Government is advised of such a claim by an insurance company, and it appears that there exists no counterclaim against the original claimant and that no substantial problems of splitting actions or of venue exist, the law officers of the Government may determine not to invoke the bar of R. S. 3477. Cf. *Martin* v. *National Surety Co.*, 300 U. S. at 594. Such discretion has traditionally been exercised in proper cases.

2. The decision below raises a special question of great importance in the defense of actions brought under the Federal Tort Claims Act. All of the states except Mississippi have workmen's compensation statutes, and there are federal laws covering longshoremen and harbor workers when injured in maritime employment and private employees in the District of Columbia. Such laws are also operative in Alaska, Hawaii, and Puerto Rico. *Workmen's Compensation: An Outline of Legislation in the United States and Territories as of January 1, 1943,* Bulletin No. 56, United States Department of Labor, p. 1. As is the case with the New York Workmen's Compensation Law, most of these statutes provide for the assignment to the employer of the injured workman's cause of action against a third party tortfeasor, where the workman accepts compensation, while some give both the employer and the employee a right of action, with provision for joinder. Moreover, claims of persons entitled to the benefits of these workmen's compensation statutes are subject to a variety

of provisions relating to the fixing of attorney fees and limiting the right of the claimant to compromise and settle his claim.

Many of the incidents of these statutes are either inconsistent with the provisions of the Federal Tort Claims Act itself or would embarrass the Government in the conduct of its business. Under the Federal Tort Claims Act, attorney fees are limited to 20 percent of the amount recovered by suit. 28 U. S. C. 2678. Criminal penalties are provided for those who charge, demand, receive, or collect an amount in excess of 20 percent "for services rendered in connection with such claim * * * ." Section 29 of the New York Workmen's Compensation Law provides a different measure of compensation for services rendered in the prosecution of the claim by a statutory assignee, for under Subdivision 2 of Section 29 the assignee is entitled to retain one-third of the amount recovered in excess of the total amount of the compensation awarded, the medical expenses paid by it, and the expenses incurred in effecting the recovery. See Appendix, *infra*, p. 31. Such expenses, of course, include attorney fees. See *Lappin* v. *National Container Corp.*, 179 Misc. 109, 112, 37 N. Y. S. 2d 800. To hold that an action against the United States under the Federal Tort Claims Act is in all respects like an action under state law against a private person is to make the provisions of the Act internally inconsistent, for if state law is controlling the limi-

tation in the Act on the compensation allowable for the prosecution of an action is removed. Obviously Congress never intended such a result.

The Court of Appeals made no effort to reconcile this inconsistency, the only reference to it being the statement at the close of the majority opinion that "The district court, of course, may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses" (R. 35). As a statement of the New York law this is incomplete, for Section 29 not only allows the statutory assignee the reasonable and necessary expenses incurred in effecting the recovery (in addition to the amount of the compensation award and medical expenses), but it also allows one-third of the excess of the recovery over and above these amounts. Also, this statement can be construed as a suggestion by the Court of Appeals that the district court might, by allowing no attorney fees whatever, keep the assignee's compensation for prosecution of the action within the limits set by Congress.[8] Even if this procedure would work in every case, however, it is inconceivable that Congress intended to make the enforcement of its 20 percent limitation discretionary with district courts.

[8] This would be true where one-third of the net recovery, after deducting the amount of the compensation award, medical expenses, and the expenses of suit other than attorney fees, was no more than 20 percent of the total recovery before deductions. Where one-third of the net recovery would be greater than 20 percent of the whole, even the procedure suggested by the court below would not be sufficient to reconcile the provisions of the state and federal law.

The question whether such state statutes are controlling in proceedings under the Act is squarely presented here and seems plainly of such importance as to require an authoritative decision of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1949.

APPENDIX

STATUTES INVOLVED

1. Sections 1346 (b), 1346 (c), 1402 (b), 2401 (b), 2402, 2412 (c), 2674, 2678, and 2680 of Title 28, United States Code, as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess. [the provisions of the above sections having been formerly embraced in Sections 410 (a), 411, 420, 421, and 422 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843-846, as amended by the Act of August 1, 1947, c. 446, as amended by the Act of August 1, 1947, c. 446, Section 1, 61 Stat. 722, 28 U. S. C. 931 (a), 932, 942, 943, and 944] provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * * * *

(b) Subject to the provisions of chapter 173 * of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under

* Apparently should read "171," since that is the number of the chapter on Tort Claims Procedure.

circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

* * * * * * *

28 U. S. C. 1402. *United States as defendant.*

* * * * * * *

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 2401. *Time for commencing action against United States.*

* * * * * * *

(b) A tort claim against the United States shall be forever barred unless action is begun thereon within one year after such claim accrues, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding $1,000 has been presented in writing to the ap-

propriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

28 U. S. C. 2402. *Jury trial denied in actions against United States.*

Any action against the United States under section 1346 of this title shall be tried by the court without a jury.

28 U. S. C. 2412. *Costs.*

* * * * * * * *

(c) In an action under subsection (b) of section 1346 of this title, costs shall be allowed in all courts to the successful claimant, but such costs shall not include attorneys' fees.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U. S. C. 2678. *Attorney fees; penalty.*

The court rendering a judgment for the plaintiff pursuant to section 1346 (b) of this title, or the head of the federal agency or his designee making an award pursuant to section 2672 of this title, or the Attorney General making a disposition pursuant to section 2677 of this title, may, as a part of such judgment, award, or settlement, determine and allow reasonable attorney fees, which if the recovery is $500 or more, shall not exceed 10 per centum of the amount recovered under section 2672 of this title, or 20 per centum of the amount recovered under section 1346 (b) of this title, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

28 U. S. C. 2680. *Exceptions.*

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty

on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

2. R. S. 3477 as amended, 31 U. S. C. 203, provides in pertinent part:

31 U. S. C. 203.

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of

this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

* * * * * * *

3. Subdivision 1, as amended by L. 1947, c. 9 and 144, and the pertinent provisions of Subdivision 2 of Section 29 of the New York Workmen's Compensation Law, are as follows:

SECTION 29. *Remedies of employees; subrogation.*

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the

awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the chairman, the employer and the insurance carrier upon a form prescribed by the chairman.

2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the

cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 35

UNITED STATES OF AMERICA, PETITIONER

v.

AETNA CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 11-14) is reported at 76 F. Supp. 333. The majority opinion of the United States Court of Appeals for the Second Circuit, and the opinion of Judge Learned Hand, concurring in part (R. 17-22), are reported at 170 F. 2d 469.

JURISDICTION

The judgment of the Court of Appeals was entered November 4, 1948 (R. 23). On January 28, 1949, this Court granted the United States an extension of time to and including March 4, 1949, within which to petition for certiorari (R. 25).

The petition for certiorari was filed March 4, 1949, and was granted April 25, 1949 (R. 27). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the prohibition by R. S. 3477, 31 U. S. C. 203, of the assignment of claims against the United States, may be invoked by the Government to bar recovery of a judgment against it under the Federal Tort Claims Act by an insurance carrier suing in its own name as (a) statutory assignee by state law and (b) equitable assignee by subrogation, of the original claim of an injured person to whom it has paid workmen's compensation benefits pursuant to its contract with his employer.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act,[1] the anti-assignment statute, R. S. 3477, 31 U. S. C. 203, the statutes providing for the counterclaim, 28 U. S. C. 1346 (c), and offset, 31 U. S. C. 71 and 227, of the Government's cross-

[1] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U.S.C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied in the Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.). The citations herein are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Tort Claims Act.

claims, and Section 29 of the New York Workmen's Compensation Law, are set forth in Appendix A of this brief, *infra* pp. 62-70.

STATEMENT

Peter Vambell, in the course of his employment as a guard and registered mail convoy for the Federal Reserve Bank of New York, was injured on February 8, 1945, on the loading platform of the General Post Office in the Borough of Manhattan, when he was struck by some mail sacks which fell from a conveyor, allegedly through the negligence of the post office employees (R. 2-3). Vambell filed a claim under the New York Workmen's Compensation Law and was awarded compensation for his injury (R. 3). Respondent, Aetna Casualty & Surety Company, the insurance carrier for the Federal Reserve Bank of New York, paid this compensation, together with the medical benefits to which Vambell was entitled (R. 3, 4).

Although the injury could have been made the subject of an action under the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842), Vambell did not bring an action against the United States. Respondent, however, on May 28, 1947, brought this action against the United States under the Tort Claims Act. For a first cause of action, respondent alleged that by operation of the New York Workmen's Compensation Law Vambell's entire cause of action had been assigned to it and sought recovery of $20,000 (R. 3-4). For a second cause of action, respondent

alleged that under its policy with the Federal Reserve Bank it had paid $348.67 for medical treatment to Vambell, for which the Bank as his employer was responsible under the New York Workmen's Compensation Law, and asked judgment for this amount as the subrogee of Vambell and his employer. As to each course of action, it was alleged that "plaintiff [respondent] has been damaged and is entitled to recover" (R. 4).

The United States moved to dismiss the complaint on the grounds that (1) the Tort Claims Act did not authorize the maintenance of an action by a subrogee or assignee of a cause of action thereunder, (2) that the action was barred by R. S. 3477, 31 U. S. C. 203, which prohibits the assignment of claims against the Government before they are allowed, and (3) that the court lacked jurisdiction of the action (R. 5-8). The district court held that R. S. 3477 does not apply to suits under the Tort Claims Act, but sustained the Government's motion to dismiss on the ground that the Act, strictly construed, gave jurisdiction only where the claim arose directly out of damage, loss, injury or death, and did not cover the claim of an assignee (R. 11-14). An order dismissing the complaint was entered (R. 14-15) and respondent, Aetna Casualty & Surety Company, appealed (R. 15).

The United States Court of Appeals for the Second Circuit reversed, holding, in an opinion by Judge Frank, Judge Learned Hand concurring in part, that the Tort Claims Act is not to be strictly

construed, that it permits the assignment by state law of an injured workmen's cause of action against the United States, that this assignment was involuntary and hence not prohibited by R. S. 3477, as amended (31 U. S. C. 203), but that even if it were otherwise within the terms of that statute, the language and purpose of the Tort Claims Act is "sufficient to carve out an implied exception for this type of claim" (R. 17-20). The court further held that Congress intended to permit such assignments, even though they will cause the United States to lose its counterclaim rights and permit venue in a district where the original claimant could not have brought the action (R. 21). As for the conflict which was pointed out between the provision in the Tort Claims Act limiting attorney fees to 20 per cent of the recovery and the provision in the New York Workmen's Compensation Law allowing the insurance carrier as assignee to retain one-third of the amount recovered over and above the amount of the compensation award, medical expenses, and expenses of the action, which include attorney fees, the court below merely stated that "The district court, of course, may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses" (R. 22).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the transfer of Vambell's cause of action to respondent was not subject to the provisions of R. S. 3477.

2. In holding that the assignment of Vambell's cause of action to respondent was an involuntary assignment.

3. In holding that even if the assignment of Vambell's cause of action to respondent were otherwise within the provisions of R. S. 3477, the Tort Claims Act has carved out an implied exception for this type of assigned claim.

4. In holding that the Tort Claims Act permits the Government's right of offset and counterclaim against the original claimant to be defeated through the prosecution of the cause of action by an assignee under state law.

5. In holding that the Tort Claims Act permits venue in a district other than that in which the original claimant could properly have brought the action, by permitting the cause of action to be prosecuted by an assignee of the original claimant.

6. In failing to hold that there is a conflict between the provision of Section 29, Subdivision 2, of the New York Workmen's Compensation Law, allowing the insurance carrier to retain one-third of the excess of any recovery it effects on an injured workman's cause of action, over and above the total amount of compensation awarded, the expenses for medical treatment paid by it, and the reasonable and necessary expenditures incurred in effecting such recovery, which includes attorney fees, and the provision of the Tort Claims Act (28 U. S. C. 2678)

limiting to 20 per cent of the recovery the compensation to be allowed for prosecuting a claim thereunder.

7. In holding that, with regard to the conflict between the provisions of the Tort Claims Act and Section 29 of the New York Workmen's Compensation Law relating to the amount allowable as compensation for prosecuting a claim, the district court, in fixing attorney fees, "may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses."

8. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

This case, together with Nos. 36, 37 and 38 presents the question of the reach of R. S. 3477, the statute invalidating assignments of claims against the United States. It is familiar that R. S. 3477 does not abrogate such assignments but merely requires that the prosecution in and out of court of claims against the Government be in the name of the original claimant. Where claims against the United States under the Tort Claims Act are covered by insurance, insurance companies making payments pursuant to their policies to the insured claimants often acquire rights of indemnification out of any recoveries by the original claimants against the United States. However, R. S. 3477, which prohibits all assignments of claims against

the United States, prohibits such an insurance carrier from bringing suit and recovering judgment in its own name under the Tort Claims Act, regardless of whether the insurance carrier claims as assignee under a statute such as Section 29 of the New York Workmen's Compensation Law or as an equitable assignee by subrogation.

II

A. The application of R. S. 3477 to such assignments of claims under the Tort Claims Act is required not only by the language of R. S. 3477, which is in terms applicable to all transfers or assignments of claims, but by the purposes of that statute. By prohibiting the assignment of claims against the United States, R. S. 3477 enables the Government to discharge its obligations to its original creditors, without becoming involved in disputes between them and third parties as to the existence and extent of assignments and other transfers of the claims. Reading R. S. 3477 with other statutes giving to the United States rights of counterclaim and offset against claimants and judgment creditors, it is clear that these rights may be effectively exercised by the United States against its original creditors only if R. S. 3477 is applied to prohibit any assignee or subrogee claiming under them from bringing suit or recovering judgment upon such claims in his own name. Requiring assignee or subrogee insurance carriers to bring suit in the name of the original claimant will satisfy their rights against the claim-

ant under the insurance contracts in the same manner as assignees have vindicated their interests in claims under the Tucker Act. *United States* v. *American Tobacco Co.*, 166 U. S. 468. At the same time, the purposes of R. S. 3477 will be fulfilled in that the United States will be able to discharge its indebtedness by paying a judgment rendered in the name of the original claimant after adjustment of the Government's cross-claims against him.

B. The purposes of R. S. 3477 make its prohibition of assignments peculiarly applicable to assignments of claims pursuant to the operation of a statute or the equitable doctrine of subrogation. The Government is less likely to be informed of the possible existence of such assignments than of assignments arising out of express agreements which are clearly prohibited by R. S. 3477. This problem of notice of assignments, and the resulting possibility of double payments, were emphasized by Congress in the Assignment of Claims Act of 1940, in which the assignment by express written agreement of certain claims against the United States was permitted upon compliance with elaborate requirements of notice to the United States. However, even where the United States has notice of a claimed assignment by operation of a statute or by subrogation, the more serious problems will relate to whether an interest in the original claim has been effectively transferred to a third person and, if so, to what extent. Further, the recognition of such

an assignment or subrogation to the extent of allowing the assignee to sue in his own name, will result in suits in districts other than that in which the claim arose or the original claimant resided, thereby embarrassing the United States in the defense of such suits, as well as resulting in a multiplicity of suits in the case of partial assignments of tort claims.

C. While this Court has heretofore recognized two classes of exceptions to the universal prohibition by R. S. 3477 of assignments of claims against the United States, it has done so only where it found that the purposes of R. S. 3477 did not require its application. The first class of exceptions is where there has been a transfer of all of the property of the original claimant to a universal successor, such as a trustee in bankruptcy or an executor. In this situation, the Government deals with the successor as it would have dealt with the original claimant—without harassment by conflicting claims, changing venue, multiplicity of suits, and without being deprived of its rights of counterclaim and offset. The second class of exceptions to the literal application of R. S. 3477 which this Court has created consists of situations where the original claim has been allowed, after opportunity for the United States to exercise its rights of counterclaim and offset, and the Government has become merely a stakeholder of the net amount. Voluntary as well as involuntary assignments have been included in

these exceptions, which have been made to turn, not on the nature of the transfer as being by "operation of law", as assumed by the court below, but on the policy and purpose of R. S. 3477 to protect important rights of the United States.

III

Not only does nothing in the Tort Claims Act suggest a Congressional purpose to create an exception to the policy of R. S. 3477, but the express provision reserving to the United States the rights of counterclaim and offset which it has under the Tucker Act commands the application of R. S. 3477 in the traditional manner established under the Tucker Act in order to make those rights effective. Thus, R. S. 3477 is the substantive federal law which determines in whose name suit must be brought under the Tort Claims Act within the meaning of the "real party in interest" provision of Rule 17 of the Rules of Civil Procedure.

IV

If state statutes such as Section 29 of the New York Workmen's Compensation Law are allowed to determine the applicability of R. S. 3477, the present case illustrates the possibilities of conflict between the state law and the policy of the Tort Claims Act. Here the conflict between the limitation of attorneys' fees in the Tort Claims Act and Section 29 can be avoided easily only if R. S. 3477 is applied to require suit in the name of the original claimant, with the incidents of such suit to be gov-

erned by federal law except as to the issue of negligence liability which Congress has referred to state law.

ARGUMENT

I

Introductory Analysis

This case, together with its companion cases, Nos. 36, 37 and 38, this Term, presents the question as to the applicability of R. S. 3477—which prohibits "all transfers and assignments * * * of any claim upon the United States"—to suits brought by insurance carriers as statutory or equitable assignees by subrogation of tort claims against the United States under the Tort Claims Act. In each of these cases, the Government asserts that R. S. 3477 requires judgments against the United States to be rendered only in the name of the original claimant and bars subrogated insurance carriers from proceeding to judgment *in their own names.*

It must be emphasized that the Government does not claim either that the existence of insurance relieves the Government from liability which would otherwise be created by the Tort Claims Act, or that insurance carriers which have paid losses on claims giving rise to liability under the Tort Claims Act are not entitled to appropriate indemnification out of recoveries obtained from the United States upon such claims. The Government invokes the bar of R.S. 3477 against suits by insurance carriers

in their own names solely for two practical reasons: (1) to insure that the United States may avoid involvement in any litigation as to the existence or extent of subrogation or other assignment of such claims; and (2) to insure that the suits and any judgments against the United States will be in the names of the original claimants so that the United States will be able to avail itself of its statutory rights in respect of venue, and of counterclaim and offset on account of any cross-claims it may have against the original claimants. Stated otherwise, the question in these cases is whether under R. S. 3477 the Government may require an insurance carrier, claiming as the assignee or subrogee of the original claimant's cause of action against the United States under the Tort Claims Act, to sue and recover judgment in the name of the original claimant.[2]

Respondent, Aetna Casualty and Surety Co., supports this suit in its own name against the United States under the Tort Claims Act by the theory that Vambell's claim had been assigned to it by virtue of Section 29 of the New York Workmen's Compensation Law, and on the further

[2] The reversal of the lower court decisions in these cases cannot ultimately defeat the insurance carriers' substantive rights. The Act of April 25, 1949, c. 92 (P.L. 55, 81st Cong.), has amended the limitation provision of 28 U.S.C. 2401(b) so that at any time before April 25, 1950, the original claimants may be joined as additional parties or new actions brought in their names.

theory that by the payment of compensation to Vambell respondent was subrogated to his claim for damages against the United States. The court below, in upholding the right of the insurance company to sue in its own name, held (1) that the assignment of Vambell's claim to respondent was an "involuntary assignment" to which R.S. 3477 does not apply, and (2) that in any event "the language and purpose of the Tort Claims Act [are] more than sufficient to carve out an implied exception for this type of claim." In Nos. 36, 37 and 38, the insurance carrier respondents similarly assert the right to sue and recover judgments in their own names, instead of in the names of the original claimants, on the theory that by the payments which they made to their assureds, the original claimants, they are subrogated to the latters' claims against the United States. In those cases too, the courts below denied the applicability of R.S. 3477, but gave no explanation of their reasons.[3]

Contrary to the views of all the courts below, the Government contends that the language and purposes of R.S. 3477 prohibit such suits by subrogees or other assignees in their own names, that the

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[3] Similar treatment was accorded the Government's contention in *Employers' Fire Insurance Co.* v. *United States*, 167 F. 2d 655, 657 (C.A. 9) and *Old Colony Insurance Co.* v. *United States*, 168 F. 2d 931, 934 (C.A. 6). Only in *United States* v. *South Carolina State Highway Dept.*, 171 F. 2d 893, 899 (C.A. 4), and *State Farm Mutual Liability Insurance Co.* v. *United States*, 172 F. 2d 737, 739-740, was the matter discussed at all and then only to the extent of the bald declaration that R.S. 3477 "has reference to voluntary transfers or assignments of claims against the United States, not to transfers by operation of law or to equitable subrogation."

Tort Claims Act in no way repealed R.S. 3477, and that the liabilities of the United States under the Tort Claims Act should be discharged, and the fiscal interests of the Government should be protected, by requiring such derivative claimants to bring their suits against the United States under the Tort Claims Act in the names of the original claimants, as has heretofore been the practice in suits under the Tucker Act.

There is no dispute in this Court that in the present case, and in Nos. 36, 37 and 38, the respondent carriers were properly subrogated, in whole or in part, to the original claims of their respective assureds, to each of whom the United States may be liable under the Tort Claims Act for the negligence of government employees. Nor is it controverted that had the suits been brought and, after trial, judgments against the United States rendered in the names of the original claimants, according to the traditional procedure settled in *United States* v. *American Tobacco Co.*, 166 U.S. 468, the respondents would be able to protect their rights by intervening or joining in the suits to obtain a direction in the judgments which would require the original claimants, upon receipt of payment of the judgments entered in their names, to repay to the respondent carriers out of the amounts thereof whatever sums the carriers were subrogated to under the terms of the contracts between the carriers and the original claimants. Civil Rule 24 (a-2); See *United States* v. *Hill*, 174 F. 2d 61, modifying 171 F. 2d 404 (C.A. 5).

It must be constantly remembered that the purpose of R.S. 3477 is not to destroy and abrogate assignments—whether statutory and equitable assignments by subrogation or express written assignments—but only to limit the obligations of the Government to the original parties with whom it has dealt, so as to relieve it of the uncertainties and embarrassments of dealing with competing claimants. It was early established that by virtue of R.S. 3477 contracts could not be assigned so as to authorize the assignee to sue in his own name. *United States* v. *Gillis*, 95 U. S. 407, affirming 12 Ct. Cls. 704. But it was even earlier settled that a court could fully save the equitable rights of any assignee by viewing the statute as authorizing suit to be brought in the name of the assignor, the recovery to be by the latter to the use of the former. *Jackson* v. *United States*, 1 Ct. Cls. 260.[4]

It was definitely established in the Court of Claims, at the latest, by its decision in *American Tobacco Co.* v. *United States*, 32 Ct. Cls. 207, 223-

[4] It was held sufficient to connect the assignor with the case by his verifying the petition, or filing a warrant of attorney, or by proving the assignment. *Silverhill* v. *United States*, 5 Ct. Cls. 610, 612. And if the assignor died *pendente lite*, verification by his personal representative was sufficient. *Pullen* v. *United States*, 7 Ct. Cls. 507. When assignor and assignee joined, the former verifying the petition alleging the suit is for the assignee, the assignment needed no further proof. *Tebbetts* v. *United States*, 5 Ct. Cls. 607. But a suit in the name of the assignor by an assignee for his own use cannot proceed to judgment without proof of the transfer. *Crowell* v. *United States*, 6 Ct. Cls. 23. Ct. Civil Rule 17(a) providing that "a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action was brought."

226, affirmed, 166 U. S. 468, that R.S. 3477 had the same and no greater effect on the form and substance of suits by insurance carriers asserting equitable assignment by subrogation to claims against the United States. Under R.S. 3477, subrogees were still to be treated in the traditional manner developed by the courts "in connection with the doctrine that upon the grounds of public policy choses in action could not be assigned so as to change the legal obligations and rights from the assignor to the assignee" (32 Ct. Cls. 226). The purpose of R.S. 3477 was to confine the obligations of the Government to parties with whom it had originally dealt and "especially to prevent the complications and troubles which might arise in the adjustment of the rights of parties because of the transfer of the contracts and obligations of the Government." "No complication or trouble as to these rights can arise out of the subrogation of the rights of the parties," the court said, so long as "the obligations and responsibilities of the original parties are to be determined upon the same basis as if no subrogation had intervened" (*Idem.*) That view of the rights and remedies was affirmed by this Court in *United States* v. *American Tobacco Co.*, 166 U. S. 468, and until the present group of cases, appears never to have been challenged.[5]

[5] The identical problem is presented under the Public Vessels and Suits in Admiralty Acts (46 U.S.C. 742 *et seq.*, 782 *et seq.*) in an even more acute form since the broad counterclaim provision of 28 U.S.C. 1346 (e) available under the Tucker and Tort Claims Acts is not available in admiralty. In such cases, the Government's right under 31 U.S.C. 227 to offset against judgments is thus unusually important.

The present cases constitute a renewal of the attacks by subrogated carriers of insurance and surety risks upon the rights of the United States to counterclaim and offset for the amounts of the cross-claims which it may have against the carriers' subrogors. This Court repulsed a broad previous attack in *United States* v. *Munsey Trust Co.*, 332 U. S. 234. There suit was brought by the bank as receiver of the original claimant, a government contractor, but was solely for the benefit of the subrogated carrier on the contractor's performance bond. This Court, reversing the Court of Claims, held that, despite the interposition of the carrier's rights of subrogation and assignment, the United States still retained the right to offset the amount of the Government's tax claim against the original claimant.[8] In the cases now at bar, the attack of the carriers seeks to narrow the *Munsey* rule by establishing their right to sue and recover judgment in their own names, despite the express terms and plain purpose of R.S. 3477. Because suits and judgments in the names of subrogated insurance carriers would permit them largely to defeat the Government's rights of counterclaim and offset

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[8] The offset there was prior to suit and was effected under 31 U.S.C. 71. But the principle that subrogation does not bar the Government from collecting its cross-claims against the carrier's subrogor would seem to apply equally to the Government's rights of counterclaim in pending litigation under 28 U.S.C. 1346 (c) and of offset against judgments under 31 U.S.C. 227 so long as suit is brought and judgment recovered in the name of the original claimant as required by R.S. 3477 and established in *United States* v. *American Tobacco Co.*, 166 U. S. 468. Cf. *United States* v. *Hill*, 174 F. 2d 61, modifying 171 F. 2d 404 (C.A. 5).

against the original claimants, the decisions below are clearly inconsistent with the rationale of the *Munsey* case.[7]

The decisions below, by holding R. S. 3477 inapplicable and permitting suit under the Tort Claims Act in the name of the carrier, will thus place the statutory or equitable assignee by subrogation in a position superior to that of his subrogor. This result, in our view, is totally unjustified by any legitimate claim by the carriers upon the consideration of Congress and is absolutely opposed to the basic conception that "the party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted. * * * subrogation was never intended to be used as an instrument to circumvent the principles of equity and by circuitous action to permit the assignee to be placed in a more advantageous position than the assignor from whom his rights devolved." *Globe Indemnity Co.* v. *United States*, 84 Ct. Cls. 587, 595, certiorari denied, 302 U. S. 707. See also *Aetna Life Insurance Co.* v. *Middleport*, 124 U. S. 534, 548.

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[7] The reason for the insurance carriers' maneuvers is found in the circumstance that the statutes in terms apply only against the plaintiff named in the suit and judgment. The counterclaim statute (28 U.S.C. 1346 (c) refers to claims or demands of the United States "against any plaintiff commencing an action." The offset statute (31 U.S.C. 227) refers to judgments where "the plaintiff therein shall be indebted to the United States." Its crucial importance for the government is obvious. *Teller* v. *United States*, 113 Fed. 463 (C.A. 8); *Eastern Transportation Co.* v. *United States*, 159 F. 2d 349, 352 (C.A. 2).

II

Statutory and Equitable Assignments by Subrogation Are Not Excepted from the Operation of R.S. 3477 by its Terms or Purposes

In upholding the right of the respondent insurance carrier to bring suit against the United States in its own name, the court below concluded that R. S. 3477 was not applicable to "involuntary assignments." This holding was related by the court to respondent's claim of an assignment pursuant to Section 29 of the New York Workmen's Compensation Law. The court did not specifically discuss the applicability of R. S. 3477 to equitable assignments by subrogation—the alternative theory of the respondent in this case, and the sole basis for claiming an assignment in Nos. 36, 37 and 38, this Term. However, this emphasis upon the allegedly voluntary or involuntary character of the transfer of a claim, and the corresponding failure to look to the function and purposes of R. S. 3477 in protecting the fiscal operations of the Government, could as well lead to the further conclusion that R. S. 3477 does not apply to equitable assignments by subrogation, and, indeed, other courts have so held. We will show that the language and purposes of the statute are peculiarly applicable to assignments of claims against the United States resulting from the operation of law. It will also be pointed out that while this Court has held that certain types of assignments or transfers of claims are not prohibited by R. S. 3477, it has done so in cases involving voluntary and involun-

tary transfers alike, but only in situations where the assignment or transfer resulted in none of the evils which the application of the statute was designed to avoid.

A. STATUTORY AND EQUITABLE ASSIGNMENTS BY SUBROGATION OF CLAIMS AGAINST THE UNITED STATES ARE PROHIBITED BY THE TERMS AND PURPOSES OF R. S. 3477.

Under the literal language of R. S. 3477, 31 U. S. C. 203, there is no exception for "involuntary assignments," as assumed by the court below (R. 20) and the statutory assignment provided by Section 29 of the New York Workmen's Compensation Act is made "absolutely null and void." R. S. 3477 provides as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, *after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.* Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having au-

> thority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors. [Emphasis supplied.]

Other than the express exception of transfers or assignments made after the allowance of the claim, the ascertainment of the amount due and the issuance of a warrant for payment, R. S. 3477 in terms admits of no exception whatever.

It has uniformly been held indispensable to the valid assertion of an assigned claim against the United States that the prescribed statutory conditions be exactly met. *United States* v. *Gillis,* 95 U. S. 407; *The John Shilloto Co.* v. *McClung,* 51 Fed. 868, 877 (C. A. 6); *H. M. O. Lumber Co.* v. *United States,* 40 F. 2d 544 (W. D. Mich.). But in the present case and its companion cases there can be no contention that the requirements of R. S. 3477 have been met in any single respect. The claims have not been "allowed," there has been no "ascertainment of the amount due" and no warrant for payment has been issued. And it must be recognized at the outset that "no single argument has more weight in statutory interpretation"

than the fact that the statutory language covers the case at hand. *Browder* v. *United States*, 312 U. S. 335, 338.

The statute "embraces alike legal and equitable assignments. * * * It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." *Spofford* v. *Kirk*, 97 U. S. 484, 488.[8] Certainly there is nothing in the language or policy of R. S. 3477 which renders that statute inapplicable to all assignments by operation of law. As the Court observed in *Spofford* v. *Kirk*, 97 U. S. 484, 488-490, "It would seem to be impossible to use language more comprehensive than this." And in *Goodman* v. *Niblack*, 102 U. S. 556, 560, this Court although holding the particular assignment there involved to be beyond the purview of the statute, specifically recognized that the statutory language "is broad enough * * * to include transfers by operation of law * * *."

The literal reading of R. S. 3477 as applicable to *all assignments* of claims against the United States, regardless of whether such assignments

[8] We do not understand respondents to deny that "Subrogation is but an equitable assignment, and puts the parties where they would be if an actual assignment had been made." *Faires* v. *Cockerell*, 88 Tex. 428, 435. The original claimant by receiving payment from his carriers "becomes trustee for them, and by necessary implication makes an equitable assignment to them of *his* right to recover *in his name*." *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474; *Rockingham Mutual Fire Insurance Co.* v. *Bosher*, 39 Me. 253, 255; *Aetna Life Ins. Co.* v. *Middleport*, 124 U. S. 534, 548.

are express or result from operation of law, finds compelling justification in the purposes of the statute to protect the fiscal operations of the Government. Indeed, as we point out later (*infra*, pp. 39-45) this Court has carved out exceptions to the literal sweep of R. S. 3477 for, and only for, those types of both "voluntary" and "involuntary" assignments of claims which in no way contravene the purposes of R. S. 3477. Indeed, these exceptions themselves suggest that the applicability or non-applicability of R. S. 3477 should be determined, not in terms of the allegedly "voluntary" or "involuntary" nature of an assignment, but by whether its application is required to effectuate its purposes.

A fundamental purpose of R. S. 3477 is to prevent the Government, in and out of court, from being "harassed by multiplying the number of persons with whom it had to deal" and from "becoming embroiled in conflicting claims, with delay and embarrassment" and the chance of multiple liability. *Hobbs* v. *McLean*, 117 U. S. 567, 576; *Martin* v. *National Surety Co.*, 300 U. S. 588, 594; *Nutt* v. *Knut*, 200 U. S. 12, 20. In other words, the statute was particularly designed to simplify the fiscal management of the United States and insure against "the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction." *Goodman* v. *Niblack*, *supra*, p. 560.

As the Court of Claims stated in *Howes & Co.* v. *United States,* 24 Ct. Cls. 170, 184, "if attachments, subrogations, and assignments, * * * should be upheld, the Government would not only be deprived of the right to settle with those claimants to whom it was originally indebted" but might also be involved in controversies between the subrogees and assignees concerned in such transfers. "The evident purpose [of R. S. 3477] is to protect the ascertainment and allowance of claims, in and out of court, against the splitting of them, against the multiplication of claimants, and against the complexities and uncertainties that might arise from disputes among the original claimant and those claiming under him." *United States* v. *Hill,* 171 F. 2d 404, 406, modified, 174 F. 2d 61 (C. A. 5).

By reason of this protective legislation respecting assignments, the Government has hitherto been able to deal exclusively with original claimants against it. It has been able to obtain a valid discharge by making prompt administrative payment directly to the original claimant of all claims against it, whether arising from contract or tort, without the need of first investigating possible changes in the ownership of the claim. It has not been required to delay payment while attempting to learn whether, in consequence of varying contractual arrangements between its original claimant and his carriers of insurance and surety risks, as to which Congress has not provided for notice to be

recorded with any government officer, there may have been an equitable assignment by subrogation of part or all of his claim, as a result of which the original claimant may no longer be entitled to retain the payment by the United States. Because of R. S. 3477, payment to the original claimant always heretofore gave the Government a valid discharge. Similarly, the Government has heretofore been able to confine its claims litigation to the single question of its liability in tort or contract, without being obliged when sued by the original claimant to also investigate and litigate additional questions arising out of the existence and effect of his insurance and surety contracts and the possible equitable assignments by subrogation resulting thereunder. Because of R. S. 3477, a judgment in a suit by the original claimant was *res judicata* of the Government's liability on the entire cause of action involved.

The effect of the decision below, when applied to the great volume of claims and suits under the Tort Claims Act, will be to defeat the long-recognized purpose of R. S. 3477 to enable the Government to deal directly and entirely with the original claimant without regard to whether, or the extent to which, his claim has been assigned to a third person, either contractually or by operation of law. The difficulties thus created for the Government are, of course, most acute in the case of partial or multiple assignments by subrogation, whether statutory or equitable.

A second basic purpose of R. S. 3477 is to make effective the Government's rights of counterclaim (28 U. S. C. 1346 (c)) and offset (31 U. S. C. 71 and 227) against its creditors. In fact R. S. 3477 must be read with those statutes as an integrated body of legislation designed by Congress to protect the Government from the risk of double payments and to facilitate the settlement of claims by and against the United States. The counterclaim statute, 28 U. S. C. 1346 (c), confers "jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section." The offset statute, 31 U. S. C. 71 and 227, directs the deduction from judgments and allowed claims against the United States of debts as to which "the plaintiff therein shall be indebted to the United States." Both the counterclaim and offset statutes apply in terms only to claims of the United States against the person who appears as plaintiff in the suit or judgment against the United States. Even assuming that the United States may still bring counterclaims arising out of the same transaction or occurrence against a subrogee or other assignee who brings suit against the United States, it is clear that the right of the United States to litigate its counterclaims in such a suit is greatly restricted, for no affirmative judgment could be obtained against such assignee. It is with respect to offsets, however, that permitting assignees to sue in their own names is most disadvantageous to the United

States. The offset statute, 31 U. S. C. 227, is in terms limited to debts owing to the United States by the judgment plaintiff, and therefore does not permit the offsetting against a judgment obtained by an assignee of debts owed to the United States by the assignor or original claimant. See letter from the Comptroller General, Appendix B *infra*, pp. 70-74.

By virtue of the prohibition by R. S. 3477 of the assignment of claims against the United States, the United States when sued has been able under 31 U. S. C. 227 to offset against any judgment in favor of the original claimant the amount of its cross-claims against him, or, if its law officers considered it appropriate, has been able under 28 U. S. C. 1346 (c) to assert such cross-claims as counter-claims in the original claimant's suit against it. The decisions below in this and in the companion cases sweep away this long-established protection of the public treasury with respect to claims under the Tort Claims Act.

Of primary importance are the cases involving the immunity from suit of states and their public bodies, such as highway, bridge and ferry authorities. In waiving its own immunity from suit, the United States has not required reciprocal treatment. While suffering judgments to be entered against itself for damages inflicted on state-owned wharves, bridges, buildings, vessels and vehicles through the negligence of employees of the United

States, the only chance which the United States has to recover for damages inflicted on federally owned property through the negligence of state employees is by counterclaim when sued by the state or by offset against judgments rendered in the state's favor. If the insurance carriers can defeat the right of the United States to offset and counterclaim in such cases by establishing their right to sue and recover judgment in their own names, the Government will incur substantial loss.[9] Moreover, even where the original claimants are private persons, instead of immune public bodies, the aggregate advantage to the carriers and the corresponding loss to the Treasury will be very great. The right to offset and counterclaim for taxes and other miscellaneous indebtedness of original claimants is of no inconsiderable importance to the United States in view of the tremendous number of cases involved.

Other practical purposes served by R. S. 3477, through prohibiting subrogees and other assignees from bringing suit in their own names, are particularly applicable to many claims which will arise under the Tort Claims Act. The insur-

[9] The amounts involved in such cases are very considerable. E.g. in *United States* v. *South Carolina State Highway Dept.*, 171 F. 2d 893 (C.A. 4), judgment was $196,639.97 for the insurance carrier and $108,526.41 for the state. In *State Road Dept. of Florida* v. *United States*, (N.D. Fla.) August 23, 1949, judgment was for $316,637.58, with direction, in accordance with *United States* v. *Hill*, *supra*, for the state to pay over $215,000.00 less attorneys' fees, to the carrier. While in neither case did the United States have any large cross-claim, in many instances it does.

ance carriers gain important advantages if they may sue in their own names and therefore lay venue anywhere throughout the United States where they are doing business (28 U. S. C. 1402 (b), 1391 (c); cf. 46 U. S. C. 782). They can thus try their lawsuit at some place to which the Government cannot readily bring its witnesses because, except as to those still in government employment, it is unable to compensate them, and compulsory process is restricted by force of Civil Rule 45 (e-1) to persons in the district or within one hundred miles. The Government is thus confined to depositions, while the insurance carriers have the advantage of live witnesses. Moreover, by splitting the cause of action into parts (cf. Nos. 37 and 38) the Government may be obliged to relitigate the same cause of action several times in different districts.[10]

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[10] This consequence is well illustrated by two suits brought by the Glen Falls Indemnity Company against the United States, being Civil Nos. 3020 and 3021 in the United States District Court for the Northern District of New York. Civil No. 3021 grew out of a collision near Florence, South Carolina, between an Army A-26 aircraft and a DC-3 operated by Eastern Air Lines, Inc. The Glen Falls Indemnity Company, which carried Eastern's insurance, paid Eastern $90,500 for the loss of its airplane and took a "subrogating receipt" assigning to it Eastern's rights arising out of the collision. Eastern Air Lines, Inc., brought an action for $125,000 damages in the District of Delaware, the district of its residence, and thereafter Glen Falls Indemnity Company brought a separate action, Civil No. 3021 in the Northern District of New York, claiming damages in the same amount. The United States has a counterclaim against Eastern for $193,557.56 based on the same accident, which it is asserting in the Delaware suit. The history of Civil No. 3020 is identical, except that the accident occurred at Nashville, Tennessee, and the Government is not

These, then, are the purposes of R. S. 3477 and the practical problems arising out of the assignment of claims against the United States. They are problems which Congress, in R. S. 3477, fully met by providing that "All transfers and assignments made of any claim upon the United States," except upon conditions which admittedly are not satisfied in this case, "shall be absolutely null and void." Since the difficulties created by the assignment of claims against the United States are no less because such assignments result from the operation of law rather than from an agreement to assign, the purposes of R. S. 3477 confirm its literal language as prohibiting every type of assignment of claims against the United States except those complying with the statutory conditions.

B. THE PURPOSES OF R. S. 3477 ARE PARTICULARLY APPLICABLE TO ASSIGNMENTS OF CLAIMS RESULTING FROM THE OPERATION OF A STATUTE OR FROM THE EQUITABLE DOCTRINE OF SUBROGATION.

We have pointed out that the terms and purposes of R. S. 3477 are fully applicable to all assignments which enable an assignee to bring suit in his own name against the United States, regardless of whether such assignment results from express contract or by operation of law. In fact, the problems created for the United States by

asserting a counterclaim. Thus each cause of action is the subject of two suits, one brought by the original claimant in the district of its residence, and the other brought by a partial subrogee claiming also as assignee in the district of its residence.

assignments resulting from the operation of law particularly require the application of R. S. 3477. If the decisions below are affirmed, the United States must henceforth, before paying an original claimant, make certain that one insurance or surety carrier has not notified some of the Government's many officers and employees that the carrier claims by subrogation or assignment, so that payment must not be made to the original claimant. For this purpose a tremendous reporting and record-keeping procedure will need to be organized at great public expense.

Analytically, in the absence of R. S. 3477, an assignment of a claim against the United States could be created by a written assignment by the original claimant to an assignee. In such a case, the United States would discharge its debt if, without notice of the assignment, it paid its original claimant. Conversely, if the assignee properly notified the Government of his assignment and claimed under it, the Government would be—at least theoretically—informed of the existence of an assignment. And were it not for the vast size of the Government, with its hundreds of thousands of employees to whom such a notice might have been given, the United States could then govern itself appropriately. Yet, it is entirely clear that Congress, having recognized the virtual impossibility of providing a workable plan for giving and recording such notices, adopted the contrary course and prohibited assignments.

The Act of February 26, 1853, now R. S. 3477, prohibits "all transfers and assignments * * * of any claim upon the United States" excepting only those executed in writing before witnesses and after allowance and issuance of a warrant for payment. As recently as 1940, Congress in enacting the Assignment of Claims Act, 54 Stat. 1029, as amended, 31 U. S. C. 203, which relaxes the prohibition of R. S. 3477 in certain cases, recognized that where assignments of unliquidated claims against the Uniter States are to be permitted, it is indispensable for the Government to be accurately informed of their existence and extent. Thus that statute required that notice of the assignments be given not only to the department concerned but also to the General Accounting Office and to the disbursing officer who would be charged with paying any claim involved. See also H. Rep. No. 2925, 76th Cong., 3d Sess. and S. Rep. No. 2136, 77th Cong., 3d Sess. It seems obvious that no comparable plan for notice and recording of rights of subrogation could be conceived to solve the conflicts and uncertainties resulting from the competing claims so often present where subrogation is involved.

The problem is far from a mere theoretical danger. It arises particularly in the handling of localized administrative settlement of claims under $1,000. A conspicuous example is that of *Old Colony Insurance Co.* v. *United States,* 168 F. 2d 931 (C.A. 6), one of the cases relied on by the courts below, where the right of the equitable assignee by

subrogation to sue in its own name despite R. S. 3477 was sustained. There, at the same time that the insurance company, which under a $50 deductible collision insurance policy had paid the greater part of the original claimant's loss, was proceeding against the Government by suit in its own name under 28 U. S. C. 1346 (b) and 2674 to recover the amount of its payment, the original claimant was obtaining an administrative adjustment of his claim by the Department of the Army under 28 U. S. C. 2672. The government attorneys were never advised of the pendency of the administrative claim as its relation to the suit was not noticed, apparently because the claim was being handled by a different office of the Army Department than the litigation and there was no system of central office cross-indexing of claims and litigation by subject-matter, as distinct from claimants, so as to discover possible duplications. The first information regarding the administrative claim received by government counsel was when insurance counsel advised immediately before the argument in the Court of Appeals that a check for the entire amount of the loss had been issued to the original claimant. Government counsel proceeded with the argument under the impression that the check would be returned. However, the check was not returned and the fact that it was outstanding rendered the case moot so that certiorari could not be asked and the case was dismissed when remanded to the trial court.

Admittedly there was inadvertent error on the part of the Army Department in not discovering that a claim which was the subject of an administrative claim by one claimant was also the subject of a suit brought in the name of an entirely different claimant. But the maintenance of a filing and indexing system which would disclose all possible duplications of claims would prevent regional settlement of claims and unreasonably and unnecessarily increase the delays to claimants and the burden on the Government in the administration of the Act. We submit that the courts should not authorize a judicial procedure which exposes the United States to such increased peril of double payment.

But, even assuming that in most cases the Government could in some way discover the possible existence of an assignment by statute or of an equitable assignment by subrogation, and refuse to pay until the rights of the claimants should be clarified, the more difficult questions would relate to whether such an assignment actually existed and, if so, its extent. At this point, the Government would be truly involved in the "complexities and uncertainties that might arise from disputes among the original claimant and those claiming under him." *United States* v. *Hill,* 171 F. 2d 404, 406, modified, 174 F. 2d 61 (C. A. 5). The Government can avoid being involved in such questions only if R. S. 3477 is applied in the light of its purposes—so as to preclude insurance carriers, claiming as statutory or equitable assignees of un-

liquidated tort claims against the United States, from suing and recovering in their own names.

Even in cases such as the instant case, where the statute purports to work an assignment of the original claimant's entire cause of action, there are possibilities of dispute with which the United States ought not to be concerned and from which R. S. 3477, if applied as intended by Congress, will spare the Government from becoming involved. Thus, the insurance carrier is not assigned the right to prosecute the complete claim in every case. Cf. *Liberty Mutual Ins. Co.* v. *American Incinerator Co.*, 51 F. 2d 739 (S.D. N.Y.); *United States F. & G. Co.* v. *Graham & Norton Co.*, 254 N. Y. 50. Nor does transfer occur immediately upon receipt of compensation by the injured workman, but only after he fails to sue within the period prescribed by Section 29. *Taylor* v. *N. Y. Central R. R. Co.*, 294 N. Y. 397, 402. Again, mere institution of suit by the original claimant is not enough to bar action by the statutory assignee; satisfaction of judgment is necessary. *Commissioners of the State Insurance Fund* v. *Farrand Optical Co.*, 295 N. Y. 493. Hence there can be frequent disputes and resulting multiple suits. This problem has already confronted the Government in *Commissioners of the State Insurance Fund* v. *United States*, 72 F. Supp. 549, further proceedings 76 F. Supp. 850, 853 (S.D. N.Y.), where the insurance carrier sued the United States, but the injured workmen insisted upon their right to sue separately

in their own names and the court required them to be dropped from the carrier's suit. Moreover, in circumstances where a workman permanently employed in one state, as in New York, is temporarily transferred by his employer to another, Section 29 may be unable to operate upon the workman's entire claim, since he may have rights to compensation both under the law of the state where the injury occurred and in New York, the state of his permanent employment. See *Industrial Commission* v. *McCartin,* 330 U. S. 622. All such controversies are easily avoided if R.S. 3477 is applied, the rule of *United States* v. *American Tobacco Co.*, 166 U. S. 468, followed, and suit required to be brought and judgment recovered in the name of the original claimant.

But while this case presents the problem in its simplest form—where the insurance carrier apparently is the assignee or subrogee of the entire claim against the United States,—in the companion cases of *United States* v. *Yorkshire Insurance Co.* and *United States* v. *The Home Insurance Co.,* Nos. 37 and 38, this Term, each of two insurance companies is suing the United States as *partial* assignee of the same unliquidated tort claim against the United States, while the original claimant apparently still retains a third portion. The possibilities thus presented for the splitting of causes of action and the multiplication of suits against the United States,—both of which the courts have recognized that R.S. 3477 was intended to prevent,—

are obvious. The Government would be required to determine, under peril of liability to make double payment, the validity and extent of the claimed right of subrogation. To obtain a valid discharge the United States must pay the proper party. Before paying, it would be required to determine whether the insurance or surety carrier or the original claimant was the lawful owner of the claim. Henceforth no mere claims examiner, although able enough to pass on the Government's liability, could be entrusted with the decision as to the person entitled to payment.[11] Only experienced lawyers skilled in insurance and surety practice and compensated at corresponding salaries could be relied upon to determine whether the particular contract between the original claimant and his insurance or surety carrier was one resulting in subrogation, so that the United States could obtain a valid discharge only by payment to the carrier, or not resulting in subrogation, so that only payment to the original claimant would discharge the Government.

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[11] The question of whether in fact the insurance company is subrogated is a prolific source of complicated litigation. See e.g. *Crab-Orchard Improvement Co.* v. *C & O Ry. Co.*, 115 F. 2d 277 (C.A. 4); *Mercer Casualty* v. *Perlmen*, 62 Ohio App. 133, 23 N.E. 2d 502; *Standard Marine Ins. Co.* v. *Scottish Metropolitan Assurance Co.*, 283 U. S. 284. As observed in *Suttles* v. *Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y.S. 1024, "The theory and basis of the right of the insurer to subrogation is that the insured has a claim against a third person which he could enforce for the loss insured against * * * but it does not follow in all cases where there has been a loss that the insurer is entitled to be subrogated to every means available to the insured for recouping his loss."

We conclude, therefore, that in the light of the purposes of R. S. 3477 in protecting the Government's fiscal operations, its prohibition of all types of assignments of claims is peculiarly applicable to the assignment of unliquidated claims under the Tort Claims Act by virtue of state statutory provisions or of the equitable doctrine of subrogation.

C. STATUTORY AND EQUITABLE ASSIGNMENTS BY SUBROGATION ARE NOT WITHIN THE EXCEPTIONS TO R. S. 3477 WHICH THIS COURT HAS HERETOFORE RECOGNIZED.

While the court below held that R. S. 3477 "does not apply to involuntary assignments", the decisions of this Court show that exception of an assignment from the prohibition of R. S. 3477 derives from the function and policy of the statute in the fiscal management of the Government, rather than from any easy characterization of the assignment as "voluntary" or "involuntary".

It is true that in a number of cases, this Court has said that certain transfers by operation of law are beyond the scope of R. S. 3477. *Erwin* v. *United States,* 97 U. S. 392, 397; *Price* v. *Forrest,* 173 U. S. 410; *Seaboard Air Line Ry.* v. *United States,* 256 U. S. 655; *Western Pac. R. R. Co.* v. *United States,* 268 U. S. 271. But the Court has made a similar determination with respect to certain types of voluntary assignments. *Goodman* v. *Niblack,* 102 U. S. 556. Reading both lines of authority in

conjunction, it is clear that all the decisions were based upon the function and policy of the Act and not the form of the transfer, and that any transfer which conflicts with both the letter and policy of the statute falls within its prohibition whether the transfer be involuntary and solely by operation of law or not.[12]

The type of situation to which R. S. 3477 is inapplicable is that presented where all of the claimant's property has been transferred by operation of law to the claimant's successor or representative, whether by descent (cf. *Erwin* v. *United States supra*), consolidation in corporate reorganization (*Seaboard Air Line Ry.* v. *United States, supra*), purchase at a judicial sale in such a reorganization (*Western Pacific R. R. Co.* v. *United States, supra*), or through some other change in the claimant's legal status. Similarly, R.S. 3477 is inapplicable to a purely voluntary assignment of all of the claimant's assets for the benefit of creditors. *Goodman*

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[12] The remark of the court below that the assignment herein was involuntary in that the claim passed to respondent under the New York statute "regardless of Vambell's intent or even of his knowledge" (R. 20), has no bearing on the question of its validity. As shown herein, the exception of an assignment from R. S. 3477 does not depend on the voluntary or involuntary nature of the transfer. But the contract of insurance was voluntarily entered into and the original claimant voluntarily chose to receive payment and thereby to permit his claim against the United States to be transferred to the respondent either under the statute or by subrogation—a choice which must certainly be characterized as voluntary. Such transfers are thus voluntary, although finally completed and made absolute by the rule that receipt of payment from the carriers "makes an equitable assignment to them of his right to recover." See *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474. The situation thus differs in no way from an express

v. *Niblack*, 102 U. S. 556. In such cases, there is a complete substitution of an authorized representative in the place of the original claimant. In this type of situation, it is necessary to withdraw the transfer from the operation of R. S. 3477 in order to effectuate the policy of the statutes which provide for the appointment of receivers and trustees in bankruptcy, and executors and administrators of decedents' estates, and to prevent unjust enrichment to the United States by way of windfall.

In such cases, it is not only obvious that there must be representative action, but it is likewise clear that such representative control does not embarrass the Government, which simply deals with the substituted representative as it would have dealt with the claimant if there had been no substitution. On the contrary, recognition of the transfer is for the convenience of the Government.[13] Prior to the death or bankruptcy, the United States could sue the claimant, it could counterclaim against him if the claimant sued first, and recover

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assignment which cannot operate except to the extent permitted by law. For as this Court observed in denying the right to sue in its own name to a purchaser at a judicial sale pursuant to a voluntary mortgage, "if the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition." *St. Paul R.R. Co.* v. *United States*, 112 U. S. 733, 736 further explained in *Butler* v. *Gorley*, 146 U. S. 303, 313.

[13] In essence this line of cases is but a corollary of the cases recognizing that since the function of the statute was the protection of the United States, not the claimant, its benefits may be waived by the Government at will. *Martin* v. *National Surety Co.*, 300 U. S. 588, 594-596; *McGowan* v. *Parrish*, 237 U. S. 285, 294; *McKnight* v. *United States*, 98 U. S. 179, 185; *Freedmans Savings Co.* v. *Shepherd*, 127 U. S. 505, 506; *Bailey* v. *United States*, 109 U. S. 432, 435.

an affirmative judgment, and it could offset its cross-claim if he obtained a judgment against the United States. If transfers of this type are recognized, the Government is in precisely the same position with reference to the executor, administrator, or trustee in bankruptcy. Moreover, such universal assignments by operation of law can give rise to no controversies as to the existence and extent of the transfer for adjudication between the United States and the original claimant and his trustee, receiver or administrator. Those matters have already been finally determined by a competent court and payment will give the United States the valid discharge which it seeks and will permit the Government's exercise of its right to offset its claims for which the receiver or trustee, as universal successor, must respond.

The only cases in which transfers of claims against the United States have been sustained by this Court in the absence of a general transfer of all the claimant's assets are those where the claim had already been adjusted and allowed and where, therefore, the Government was merely in the position of a stakeholder.[14] For example, in *Price* v.

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[14] It is true that R. S. 3477 has been held inapplicable to the purchase at a judicial sale of all the assets of a corporation in reorganization (*Western Pac. R. R. Co.* v. *United States*, *supra*) and that the purchaser at such a sale does not necessarily succeed to all the liabilities of the original claimant. In the *Western Pacific* case, however, no question of embarrassment to the Government in the settlement of any counterclaim was involved. In view of the nature of reorganization proceedings, no such question could arise even if the Government had a claim against the original corporation. In such proceed-

Forrest, 173 U. S. 410, relied upon by the court below, a debtor was directed by court order to deliver and endorse to a receiver any draft obtained from the Government in payment of the debtor's claim and to consent in writing that any balance which might be allowed should be paid to the receiver. After the claimant's death, his heirs were enjoined from demanding or receiving payment from the Government. The question whether the Government officials could be enjoined from paying any award to the original claimant or his heirs was not decided. The Court said (pp. 423, 424):

> We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; *provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the*

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ings; all claims against the original corporation would be presented to the receiver and allowed or disallowed prior to the sale in order to determine the claimant's status under the reorganization plan. The respective claims of the Government and the original corporation would be adjusted and the Government's position as net creditor or debtor would be determined prior to sale. As a practical matter, therefore, the Government would never be required to deal with more than one person in a reorganization case.

> *United States.* * * * Even if it be true that the final order of the state court in relation to the money in question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of court appointing the receiver would be null and void, as between those who are parties to the cause and who are before the court. [Emphasis supplied]

Similarly, in *Houston* v. *Ormes,* 252 U. S. 469, the Court held that R. S. 3477 was not a bar to an action seeking to establish a lien for attorneys' fees on a fund appropriated by Congress to a specific claimant and to require the Secretary of the Treasury to pay the fund to a receiver. The decision was placed upon the ground that the statute "does not stand in the way of giving effect to an assignment by operation of law *after the claim has been allowed.*" (*Id.* at 474, emphasis supplied.)

It is evident that the present case falls neither into the category of cases where the legal status of the original claimant is changed, so that unless the representative or successor is allowed to prosecute the claim the United States will be unjustly enriched by escaping liability for the tort of its employee, nor does it fall into the category of the transfer of a claim which has been allowed after all lawful counterclaims and offsets in favor of the United States have been effected. On the contrary, this was the assignment of a single claim only, placing it in the hands of respondent who, under the

decision of the court below, is free to prosecute it without being answerable on any counterclaim or offset which the United States would normally assert against the assignor before final allowance of his claim or payment of any judgment rendered in his favor.

The foregoing analysis demonstrates, we believe, that the holding of the courts below that R. S. 3477 is not a bar to the maintenance of the present actions by respondents in their own names, finds no support in the decisions of this Court. And since, as we have shown, the type of transfer of claim involved in statutory and equitable assignments by subrogation violates both the letter and the purpose of the statutory bar, we believe it evident that the courts below erred in failing to apply R. S. 3477 and require suit to be brought and judgment recovered exclusively in the original claimant's name.

III

The Tort Claims Act Has Not Repealed R. S. 3477 Nor Excepted Statutory or Equitable Assignments by Subrogation from its Operation

The court below, as its second ground for holding that statutory or equitable assignments by subrogation are not barred by R. S. 3477, stated, "we think the language and purpose of the Tort Claims Act more than sufficient to carve out an implied exception for this type of claim" (R. 33). No elaboration of this view was advanced. Its rationale would appear equally applicable to express written assignments so that an original claimant could always defeat the rights of the United States in respect of

venue, counterclaim and offset by assigning his claim to a third party. We submit that any such exception to the command of R. S. 3477, so easily found below, must be based on compelling considerations and that no such factors are here present.

A. THE LANGUAGE AND PURPOSE OF THE TORT CLAIMS ACT ARE FULLY SERVED IF THE PERSON ORIGINALLY DAMAGED CAN MAINTAIN AN ACTION.

The district court correctly, in our view, dismissed respondent's complaint. The complaint alleged that respondent itself "has been damaged and is entitled to recover" (R. 4). It did not purport to be a suit in the right of Vambell who had been injured by the United States. Respondent's damage, if any, by being required to pay Vambell was the consequence of its contract with his employer, not of the tort of the United States. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301. The Tort Claims Act confers jurisdiction on the district courts "of all civil actions on claims against the United States for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government" (28 U. S. C. 1346). It is beyond controversy that the only claim against the United States "for injury or loss of property, or personal injury or death" within the language of the Act is that of the individual whose person or property is injured or damaged. Payment to such an individual by an insurance carrier

does not give rise to any new claim by the carrier against the United States, jurisdiction of which has been granted by the Tort Claims Act.[15] All that can occur is that in those cases where a statute provides that the original claim shall be assigned to an insurance carrier or where the carrier's contract is of a type by which upon payment it becomes subrogated to the original claim of its assured, the carrier becomes statutory or equitable assignee of the claim of the original claimant against the United States. It follows that if such statutory or equitable assignments are barred by R. S. 3477, as the United States contends, the carrier has no claim upon which it can sue the United States under the Tort Claims Act in its own name, although as a subrogees it is unquestionably entitled to have suit brought and, if liability is found, to have judgment rendered in the name of the original claimant.

The Government contends, therefore, that any suit against the United States by the carriers on the ground that they have made payments to their assureds pursuant to their insurance contracts, does not fall within those cases of which jurisdiction is granted by the Tort Claims Act. We believe that the mere statement of this contention is ample to establish its correctness if, as the United States

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[15] *Cascade County* v. *United States*, 75 F. Supp. 850, 852; Cf. *United States* v. *Gillis*, 95 U. S. 407, 417; *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474. The fact that twelve sources of claims are listed as excluded indicates no intent that other types of claim may be sued on by others than the original claimant. But cf. *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 656 (C.A. 9).

believes, R. S. 3477 applies to suits under the Tort Claims Act just as it has always been applied to suits under the Tucker Act. Accordingly, we turn to the consideration of that basic question.

The purposes of the Tort Claims Act are fully served if the person originally sustaining injury can maintain his tort action against the United States and if any subrogee can sue and recover in his name in the traditional manner. *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474; *Doleman* v. *Levine*, 295 U. S. 221, 225; *United States* v. *Hill*, 174 F. 2d 61 (C. A. 5). It is not necessary also to permit the cause of action to be transferred to another with an absolute right to recover judgment against the United States in his own name and thereby cut off the offsets and counterclaims which the Government may have against the original claimant. This fact alone is sufficient, we submit, to sustain the Government's position herein in view of the familiar rule that implied repeals are looked upon with disfavor. *General Motors Corp.* v. *United States*, 286 U. S. 49, 61-62; *United States* v. *Jackson*, 302 U. S. 628, 631; *United States* v. *Borden Corp.*, 308 U. S. 188, 198; *U. S. Alkali Assn.* v. *United States*, 325 U. S. 196, 209.

Moreover, it seems hardly likely that Congress intended that the persons who might sue the United States on the claim of another should depend on the particular variations of local state law. The Tort Claims Act does not in terms suggest it and we submit that the policy of the Act demonstrates it should

not be so construed. Cf. *United States* v. *Michel*, 282 U. S. 656; *Price* v. *United States and Osage Indians*, 174 U. S. 373; *Schillinger* v. *United States*, 155 U. S. 163. It must be remembered that whatever the extent of the Tort Claims Act's consent to suit, it does not, unlike corporate sue-and-be-sued clauses, extend consent to every suit nor to suit in every form. The limits of consent to suit are jurisdictional and it is settled that state law cannot enlarge or restrict the jurisdiction of the federal courts. *Munro* v. *United States*, 303 U. S. 36, 41; *Penn Co.* v. *Pennsylvania*, 294 U. S. 189, 197; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 175.

B. THE TORT CLAIMS ACT DID NOT REPEAL R. S. 3477 EITHER IN TERMS OR BY ANY NECESSARY IMPLICATION.

The view of the court below that the Tort Claims Act carves out an exception to the statute finds no support in the treatment given by this Court to similar acts permitting suit against the United States. These same contentions that R. S. 3477 was impliedly repealed were made many years ago in respect of the legislation authorizing suit against the United States in the Court of Claims. This Court rejected them in *United States* v. *Gillis*, 95 U. S. 407, 414-416, observing:

> * * * If it be said the danger the act sought to provide a guard against was that fraudulent assignments of just claims might be im-

> posed upon the accounting officers, so that the government, after one payment to a pretended assignee, might find itself confronted by the real creditor and be called upon to pay again, the answer is that the same danger would attend the payment or allowance to an assignee, after a trial in court, * * * We discover nothing in reason, nothing in the mischief the act was plainly intended to remedy, and nothing in the language employed tending to warrant the admission of any exceptions from the comprehensive provisions made; nothing that can justify our holding that, when Congress said all transfers or assignments, partial or entire, absolute or conditional, of claims against the United States shall be null and void, they meant they should be in operation [inoperative] only when presented to the accounting officers of the treasury, but effective when presented everywhere else.
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> That the act creating the Court of Claims did not work a repeal of any provisions of the act of 1853, nor itself make claims assignable that were incapable of assignment before its enactment, is beyond reasonable doubt. It certainly contains no words expressly repealing any former statute, either in whole or in part. And there is no necessary implication of intentional repeal. Implied repeals are not favored. * * *

And this Court concluded that "claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name" (*ib.* 417). This view of the matter was followed in *United*

States v. *American Tobacco Co.*, 166 U. S. 468, 474, which again held that insurance carriers should sue in the name of the original claimants.

But, unlike the legislation culminating in the Tucker Act, the Tort Claims Act is not silent on the point. It expressly provides that both court and payment procedure, including counterclaim and offset, should follow the federal law as previously applied by the courts under the Tucker Act. In Section 411 of the original Act (60 Stat. 844) it is expressly declared that all matters of court procedure under the Tort Claims Act shall, like those under the Tucker Act, follow the Federal Rules of Civil Procedure and that "the same provisions for counterclaim and set-off * * * and for payment of judgments, shall be applicable as in cases brought in the United States district courts" under the Tucker Act.[16] And the House Judiciary Committee expressly stated that the intent of the Act was that the district courts should exercise the same type of jurisdiction as under the Tucker Act.[17]

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[16] The Act provides: "PROCEDURE; Sec. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505)."

[17] H. Rep. No. 2245, 77th Cong. 2d Sess. p. 9:

"It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act.

We believe, therefore, that Congress clearly intended this provision as a reaffirmance and implementation of the traditional policy of assuring certainty in the Government's rights of counterclaim under 28 U. S. C. 1346 and offset under 31 U. S. C. 227 which underlies the established rule that R. S. 3477 requires that claims against the Government be prosecuted in the name of the original claimant.[18] Moreover, if Congress had expected that R. S. 3477 would not apply to prohibit suits by assignees and transferees in their own names, it would have provided in the section regarding venue, for the transfer of actions brought by a subrogee or other assignee in the district of his residence to the district where the accident occurred or the original claimant resided.[19]

But this provision as to procedure does not stand

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* * * The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. See *United States* v. *Sherwood*, 312 U. S. 584 (1941); *Lynn* v. *United States*, 110 F. 2d 586, 588 (C. A. 5, 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891)". See also H. Rep. 1289 79th Cong., 1st Sess.

[18] S. Rep. 1196, 77th Cong., 2d Sess., p. 6: Judgments "are to be paid in the same manner as judgments rendered upon contract claims under the Tucker Act" and the same practice and procedure is to govern.

[19] It should be noted that as enacted the Tort Claims Act (Sec. 410, 28 U.S.C. 1402(b)) permits venue in either the district where the accident occurred or in that of the plaintiff's residence. The Senate at one time restricted venue to the place of the accident alone. See H. Rep. 2245, 77th Cong. 2d Sess. p. 11. At no time was the serious venue problem, and the danger of harassment of the United States as a result of assignments and subrogations, ever adverted to in the reports or debates.

alone. Under 28 U. S. C. 1346 (b) and 2674, the local law is made controlling only on the question of whether an actionable tort has been committed and not on the transfer of the original claimant's right of recovery after it has occurred.[20] While the question of whether an actionable wrong has occurred was referred by Congress, as a matter of convenience, to the rules of local law, the question of how such a right of action may be transferred and in whose names the action must be filed is left to be determined by the law of the federal forum. *State of Maryland, to use of Burkhardt* v. *United States*, 165 F. 2d 869, 871 (C. A. 4); cf. *Montgomery Ward & Co.* v. *Callahan*, 127 F. 2d 32, 36 (C. A. 10). Thus the question of the rights of the subrogee or other assignee of a claim against the United States to sue and recover in his own name instead of that of his transferor is governed exclusively by federal law. That law, we submit, is found in R. S. 3477 on the basis of which the Government's fiscal management procedures have long been established. (See letter of the Comptroller General, Appendix B, *infra*, pp. 70-74.

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[20] Section 1346 provides: "Subject to the provisions of chapter 171 of this title [*i.e.*, § 2674], the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * *caused* by the negligent or wrongful act or omission of any employee of the government * * * *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" And Section 2674 provides: "The United States *shall be liable* * * * *in the same manner and to the same extent as a private individual* under like circumstances" [Emphasis supplied]

The Tort Claims Act, like the Tucker Act, is administered by the courts under the Federal Rules of Civil Procedure in the same manner as litigation between private parties. However, those rules expressly save the operation of substantive rules such as R. S. 3477. Civil Rule 17 (a) expressly provides that a trustee or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. The settled interpretation of the anti-assignment statute clearly authorizes and requires the bringing of such suits in the name of the original claimant. And in *United States* v. *American Tobacco Co.*, 166 U. S. 468, where suit was brought in the name of the original claimant instead of the forty-two subrogated insurance carriers, this Court declared (p. 474):

> The companies must recover in the name of the tobacco company and by reason of its rights. * * * Payment to the owner by the insurer does not bar the right against another party originally liable for the loss, but the owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of *his* right to recover *in his name.*

See also, *Aetna Insurance Co.* v. *Hannibal & St. J. R. R. Co.*, 1 Fed. Cas. No. 96; *Southern Bell Telephone Co.* v. *Watts*, 66 Fed. 460 (C. A. 4).

The alternate provision in Rule 17 (a) providing for suit in the name of the "real party in interest" while abolishing the practice of "use suits" in ordinary cases between private parties does not conflict with R. S. 3477. As pointed out in 3 Moore, *Federal Practice* (2d ed., 1948), § 17.02, p. 1305, the meaning and object of Rule 17 (a) would be more accurately expressed if it read: "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced." We believe that correctly construed the substantive effect of R. S. 3477 is to make only the original claimant the correct party plaintiff in suits against the United States. As was pointed out by the court in *United States* v. *Hill*, 171 F. 2d 404, 407, the anti-assignment statute has a serious public purpose and is not a mere technicality set aside by the Civil Rules. "It is a peculiar and substantial incident attached specially to all claims against the Government whether adjusted in or out of court." The general provisions of the Civil Rules as to real party in interest for purposes of suit "have neither the intention nor the effect of setting aside this Act."

We submit that the foregoing analysis of the purpose and language of the Tort Claims Act demonstrates the continued validity of R. S. 3477 in these fields. The insurance carriers' assertion of a right to prosecute to judgment in their own names all or part of the insured original claimants' causes of action against the United States is without prac-

tical justification. No reason appears why their legitimate substantive interests in reimbursement out of a possible recovery from the United States cannot be protected in connection with actions under the Tort Claims Act as that interest has been traditionally protected under the Tucker Act. See *United States* v. *Hill, supra;* cf. *United States* v. *American Tobacco Co.,* 166 U. S. 468. If added protection is required by the carriers against the original claimants with whom they have contracted, it is readily available by the familiar devices of policy cooperation clauses and payment on "borrow and loan" receipts. After all, it cannot be disregarded that the insurance carrier chooses its assureds and should assume the risk of their good faith. There is no reason to impose upon the United States the duty of protecting the carrier from the bad faith of its assured in failing to perform his duty to reimburse the carrier out of the payment received from the United States.

IV

Section 29 of the New York Workmen's Compensation Law is Incompatible with the Tort Claims Act

The foregoing demonstrates, we believe, that Congress in enacting the Tort Claims Act plainly contemplated that R.S. 3477 would apply to statutory and equitable assignments by subrogation. Further conclusive evidence that the application to the United States of provisions such as Section 29 of the New York law was not intended by Congress, is found in the fact that many of the incidents of

such local statutes not only would embarrass the Government in its purpose of effecting quick and equitable settlement with the injured man, but are totally inconsistent with the policy and provisions of the Tort Claims Act. Under the Tort Claims Act, attorney fees are limited to 20 per cent of the amount recovered by suit. 28 U.S.C. 2678. Criminal penalties are provided for those who charge, demand, receive, or collect an amount in excess of 20 per cent "for services rendered in connection with such claim * * *." Section 29 of the New York Workmen's Compensation law provides a different measure of compensation for services rendered in the prosecution of the claim by the statutory assignee. Under paragraph 2 of Section 29, the assignee may retain one-third of the amount recovered in excess of the total amount of the compensation awarded, the medical expenses paid by it, and the expenses incurred in effecting the recovery. See Appendix A *infra*, pp. 69-70. Such expenses, of course, include attorney fees. See *Lappin v. National Container Corp.*, 179 Misc. 109, 112, 37 N.Y.S. 2d 800.

To hold, as did the court below, that an action against the United States under the Tort Claims Act is in all respects like an action under state law against a private person is thus to make the provisions of the Tort Claims Act internally inconsistent and totally defeat the policy of the Act respecting the net recovery to be received by the original injured claimant. If the local state law is controlling, the limitation in the federal act on the compensa-

tion allowable for the prosecution of an action is entirely removed. Obviously Congress never intended to authorize such a result.[21] Yet the Court of Appeals made no effort to reconcile this inconsistency, its only reference to it being the statement at the close of the majority opinion that "The district court, of course, may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses" (R. 22). As a statement of the New York law this remark of the court below is plainly incomplete, for section 29 not only allows the statutory assignee the reasonable and necessary expenses incurred in effecting the recovery (in addition to the amount of the compensation award and medical expenses), but it also allows one-third of the excess of the recovery over and above these amounts. But the remark can equally be construed as a suggestion by the Court of Appeals that the district court could by allowing no attorney fee whatever, keep the assignee's compensation for prosecution of the action within the limits set by Congress.[22] Even if this procedure would work in every case, which obviously it would not, it is inconceivable, in view of the criminal penalties,

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[21] Heretofore great deference has been shown such directions of Congress respecting attorneys' fees. See e.g., *Ball* v. *Halsell*, 161 U. S. 72, 84.

[22] This would be true where one-third of the net recovery, after deducting the amount of the compensation award, medical expenses, and the expenses of suit other than attorney fees, was no more than 20 per cent of the total recovery before deductions. Where one-third of the net recovery would be greater than 20 per cent of the whole, even the procedure suggested by the court below would not be sufficient to reconcile the provisions of the state and federal law.

that Congress intended to make the enforcement of its policy of limiting attorneys' fees discretionary with the district courts.

This conflict of policy between the New York compensation statute and the attorney fees provision of the federal act is but one of the possible sources of controversy if state compensation laws are allowed to transfer claims against the United States notwithstanding R.S. 3477. All states except Mississippi have workmen's compensation statutes. United States Department of Labor, Bulletin No. 56, *Workmen's Compensation: An Outline of Legislation in the United States and Territories as of January 1, 1943*, p. 1. As with the New York law, most of these statutes provide for the assignment to the employer of the injured workman's cause of action against a third party tortfeasor, where the workman accepts compensation, but some give both the employer and the employee a right of action, occasionally without provision for joinder. Moreover, the claims of persons entitled to the benefits of these workmen's compensation statutes are subject to a variety of provisions relating to the fixing of attorney fees and limiting the right of the claimant to compromise and settle his claim, substantially all of which will conflict with the policy of Congress established in the Tort Claims Act.

On the other hand, the application of R. S. 3477 to bar such statutory assignments by state law will not in any way frustrate the fundamental public

policy of workmen's compensation legislation of protecting the injured employee, while still enabling compensation carriers to obtain indemnification from the United States when it is responsible for the injuries on account of which compensation has been paid. All compensation legislation contains protective provisions dealing with situations where recovery from the third party is effected by the employee who has accepted compensation. Thus, section 29, paragraph 1, of the New York Workmen's Compensation Law gives the insurance carrier a lien, to the extent of the compensation and medical expenses paid by it, on any recovery had in an action brought by the injured workman. Similar provisions, found in all compensation legislation, furnish ample protection for the indemnification of insurance carriers and cannot conflict with R. S. 3477, since they operate only after the amount of the Government's liability on the original claim has already been determined by proper proceedings, the Government's rights of offset exercised, and payment allowed by the General Accounting Office. See *Houston* v. *Ormes*, 252 U. S. 469, 474; *Price* v. *Forrest*, 173 U. S. 410. And if the injured workman should fail or refuse to bring an action, the insurance carrier is fully able to protect its derivative right under the state law by bringing action against the United States in the name of the workman. Cf. *Independent Wireless Co.* v. *Radio Corp.*, 269 U. S. 459; *Dole-*

man v. *Levine*, 295 U. S. 221, 225; *United States v. Hill*, 174 F. 2d 61 (C.A. 5).

We submit, therefore, that only the application of R. S. 3477 avoids conflict and confusion between the policies and incidents of the state workmen's compensation laws on the one hand and the protective statutes of Congress respecting collections and judgments against the United States on the other. We believe the court below erred in not applying R. S. 3477 and we invoke its application by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below erred in failing to apply R. S. 3477 to require suit to be brought in the name of the original claimant, and that the decision below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
LEAVENWORTH COLBY,
SAMUEL D. SLADE,
JOSEPH KOVNER,
Attorneys.

SEPTEMBER 1949.

APPENDIX A

STATUTES INVOLVED

1. Sections 1346(b), 1346(c), 1402(b), 2674 and 2680 of Title 28, United States Code, as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess. and amended by the Act of May 24, 1949, Public Law 72, 81st Cong., 1st Sess. [the provisions of the above sections having been formerly embraced in Section 410(a) and 411 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843-844, as amended by the Act of August 1, 1947, c. 446, Section 1, 61 Stat. 722, 28 U. S. C. 931(a) and 932] provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

* * * * *

28 U. S. C. 1402. *United States as defendant.*

* * * * *

(b) Any civil action ~~on~~ a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

* * * * *

28 U. S. C. 2680. *Exceptions.*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

2. The Anti-assignment statute, R. S. 3477, as amended, 31 U. S. C. 203, provides in pertinent part:

31 U. S. C. 203. *Assignments of Claims.*

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and exe-

cuted in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

* * * * *

3. The Offset statute (31 U.S.C. 71 and 227) provides:

31 U. S. C. 71. *Public accounts to be settled in General Accounting Office.*

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

31 U. S. C. 227. *Offsets against judgments against United States.*

When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered

against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been witheld from the plaintiff.

4. Subdivision 1, as amended by L. 1947, c. 9 and 144, and the pertinent provisions of Subdivision 2 of Section 29 of the New York Workmen's Compensation Law, are as follows:

Section 29. *Remedies of employees; subrogation.*

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not

later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the chairman, the employer and the insurance carrier upon a form prescribed by the chairman.

2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause

of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. * * *

APPENDIX B

Comptroller General of the United States

Washington

B-35182
B-60905

September 1, 1949.

The Honorable The Attorney General

My dear Mr. Attorney General:

This is in response to the informal inquiry of August 26, 1949, by your Department with respect

to the practice and procedure of the General Accounting Office in examining and settling claims, including judgments rendered against the United States, where a cross claim is found to be involved.

In furtherance of the duties imposed upon the General Accounting Office by 31 U. S. C. 71, 72, 93 and 227, and in view of the enactment of relief legislation relating to accountable officers or the inadequacy of their surety bonds to insure recovery, in proceedings under 31 U. S. C. 505, of large overpayments incident to Government transactions during the First World War for which credit had been disallowed or suspended in the official accounts of accountable officers, the Department of Justice (file 208677) suggested to the Comptroller General that "recoveries very greatly in excess of the cost might be realized by creating a small additional force" in the General Accounting Office "charged with the duty of collecting, as far as possible, all such suspended or disallowed items from the ultimate beneficiaries."

For purposes of convenience and practicability the special procedure thus suggested by the Attorney General was consolidated with the ordinary accounting procedure for collection of debts certified due by the General Accounting Office as outlined in the Annual Report of the General Accounting Office, 1923, House Document No. 101, 68th Congress, 1st Session, page 6; and, by Circular No. 10 of February 7, 1923, the Comptroller General established a collection unit whose functions included the keeping of a record of all debts owed to the United States incident to any transaction of any of its agents or agencies. By General Regulation No. 37 of July 7, 1924, 4 Comp. Gen. 1083, the collection

unit was transferred to the Claims Division of the General Accounting Office, so that its work was coordinated with the settlement and adjustment of claims by or against the United States or in which the Government is concerned either as debtor or creditor. General Regulation 50, Supplement 1, issued on April 4, 1934, 13 Comp. Gen. 491, provides that all Government departments and agencies will transmit to the General Accounting Office reports of any debts due to them or to the United States and the procedure so prescribed has ever since continued in effect.

Since this system was set up, whenever any claim is presented to the General Accounting Office and allowed, and it is found that the claimant is indebted to the United States in any amount, the certificate of settlement of the General Accounting Office directs that the amount due and allowed to the claimant be applied, to the extent required, to the payment of the debt due to the United States or any of its agencies, as shown by the debt records. If the amount due to the United States or its agencies is less than the amount due to the claimant, the certificate of settlement directs the issuance of two checks, one to the agency or official having custody or jurisdiction over the account to be credited with the amount of the debt, and the balance to the claimant. Such directions are uniformly observed by the Treasurer of the United States.

If the claim so presented to this Office is for payment of a judgment recovered against the United States under the Tort Claims Act, Public Vessels Act, Suits in Admiralty Act or Tucker Act, this Office proceeds in accordance with the require-

ments of 31 U. S. C. 227. Thus, should the plaintiff therein be indebted to the United States in any manner, whether as principal or surety, this Office must withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, this Office executes a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then this Office is required to withhold payment of such further amount of such judgment as in its opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it is then the duty of this Office to cause appropriate proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance is paid over to such plaintiff by this Office with six per centum interest thereon for the time it has been withheld from the plaintiff.

It goes without saying that the operation of this established procedure enjoined upon the General Accounting Office by 31 U. S. C. 227, together with other applicable statutes, and the long-continued approbation given by the Congress to the established claims procedure of the Office would be exposed to serious delay and confusion, if not defeated altogether, should judgments, contrary to

the requirements of the anti-assignment statute (R. S. 3477), be rendered in the name of plaintiffs other than the original claimants to whom the United States is indebted.

On the other hand, any form of judgment in accordance with the directions of the court in *United States* v. *Hill* (5th Cir., 1949), 174 F. 2d 61, modifying 171 F. 2d 404, whereby judgment is awarded to the original claimants, but with a direction whereby they are charged to pay out of their recoveries when received from the United States the various amounts to which their attorneys and their insurers may be entitled, is entirely workable and satisfactory to this Office. It appears that when such judgments are submitted to this Office for settlement, payment will be authorized to be made to the plaintiffs after appropriate action under 31 U. S. C. 227, it being understood that thereafter the plaintiffs will themselves make payments to the attorneys and insurance companies as required by the terms of the payments.

Sincerely yours,

/s/ Lindsay C. Warren,
Comptroller General
of the United States.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 35

35

UNITED STATES OF AMERICA,

Petitioner,

v.

AETNA CASUALTY AND SURETY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

WILLIAM A. HYMAN,
Attorney for Respondent.

WILLIAM A. HYMAN,
HAROLD W. HAYMAN,
MELVILLE HARRIS,
on the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 35

UNITED STATES OF AMERICA,

Petitioner,

v.

AETNA CASUALTY AND SURETY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was granted by order filed April 25, 1949 (R. 27).

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (R. 11-14) is reported at 76 F. Supp. 333. The majority opinion of the United States Court of Appeals for the Second Circuit and the concurring opinion of Judge Learned Hand (R. 17-22) are reported at 170 F. 2d 469.

Jurisdiction

The petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254(1).

Question Presented

The sole question presented by petitioner is whether the prohibition of R. S. 3477, 31 U. S. C. 203, barring the assignment of claims against the United States, may be invoked by the Government to prevent maintenance of an action against it under the Tort Claims Act instituted by an insurance carrier to which has been transferred by operation of law (Section 29 of the Workmen's Compensation Law of the State of New York) the entire cause of action of a workman injured in New York by the negligence of the Government, where by the operation of said New York statute no cause of action remains in the injured workman and the entire cause of action belongs to and can be maintained only by the insurance carrier.

In the courts below the petitioner contended that the Tort Claims Act must be strictly interpreted and applied so as to permit suit only by direct claimants and to prevent suit by subrogees or assignees by operation of law (R. 5, 6, 7, 12, 13, 19). This contention has now been abandoned by petitioner.

In the petition for certiorari petitioner conceded that the language of the Tort Claims Act places the United States in the shoes of a private person in all respects, making it subject to actions on tort claims by assignees or subrogees whenever such actions are permitted against private persons by state law (Petition, p. 8).

Statutes Involved

Sections 410(a) and 421 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, now, with immaterial amendments, in the new Judicial Code; 28 U. S. C. 1346(b), 1346(c), 2674, 2678; R. S. 3477, 31 U. S. C. 203; and Section 29 of the New York Workmen's Compensation Law, are set forth in the appendix, *infra*.

Statement

The facts are incompletely stated in the petition for writ of certiorari and in the petitioner's brief. Peter Vambell was injured on February 8, 1945. The Federal Tort Claims Act was passed on August 2, 1946. Section 29 of the New York Workmen's Compensation Law, as amended by L. 1947, c. 9 and c. 144, permitted an injured workman to bring an action not later than nine months after the enactment of the Federal Tort Claims Act. These nine months expired May 2, 1947. On that day Vambell's entire cause of action was transferred to the respondent by the operation of Section 29 of the New York Workmen's Compensation Law. On May 28, 1947, the respondent instituted this action.

It is conceded by petitioner that respondent is properly the assignee by operation of law of Vambell's entire cause of action. (See Petition, pp. 11, 12; Petitioner's brief, pp. 36, 37.)

Summary of Argument

POINT I. The failure of Vambell, the injured person, to commence an action against the United States within the time limited by Section 29 of the New York Workmen's Compensation Law operated to assign his entire cause of action to the respondent. Thereafter, only the respondent,

the insurance carrier, owned the cause of action and could sue thereon. Vambell had no interest in the cause of action as such and he could not sue on it. If the prosecution of the action by the respondent were to be held barred by R. S. 3477, then no one could sue the United States for its tort and the United States would be unjustly enriched. Petitioner's brief is based upon its failure to recognize this clear and simple proposition. Accordingly, none of petitioner's arguments has any validity.

POINT II. The Anti-Assignment Act, R. S. 3477, 31 U. S. C. 203, does not apply to the instant case because the assignment of Vambell's cause of action was by operation of law and involuntary. The purpose of R. S. 3477, to prevent fraud upon the Government and the embroilment of the Government in conflicting claims, has no applicability to the instant case.

POINT III. The test of the right of the respondent to maintain this action is whether the respondent would have a cause of action under the law of New York if the petitioner were a private person.

POINT IV. The petitioner's contention that R. S. 3477 should now be interpreted so as to bar this action on an involuntarily assigned claim, because the petitioner anticipates that it may have certain hypothetical, procedural difficulties in other cases, has no merit. No valid reason has been presented by the petitioner for upsetting the proposition, which has been so well established by a long line of decisions of this Court, that R. S. 3477 does not apply to transfers by operation of law

POINT V. The current trend of legislative policy and of judicial thought is towards the abandonment of the monarchistic doctrine of governmental immunity. The enactment of the Federal Tort Claims Act is a conspicuous step forward in the progress of this trend. The attempt of the

petitioner to invoke the Anti-Assignment Act as a bar in the instant case is in direct conflict with this trend. In addition to all the other reasons, this justifies the Court in refusing to sustain the contention of the petitioner and in permitting the instant action to be maintained by respondent.

ARGUMENT

POINT I

The failure of Vambell, the injured person, to commence an action against the United States within the time limited by Section 29 of the New York Workmen's Compensation Law, operated to assign his entire cause of action to the respondent. Thereafter, only the respondent, the insurance carrier, owned the cause of action and could sue thereon. Vambell had no interest in the cause of action as such and he could not sue on it. If the prosecution of the action by the respondent were to be held barred by R. S. 3477, then no one could sue the United States for its tort and the United States would be unjustly enriched. Petitioner's brief is based upon its failure to recognize this clear and simple proposition. Accordingly, none of petitioner's arguments has any validity.

Section 29 of the New York Workmen's Compensation Law (Appendix, *infra*, pp. 45, 46) specifically provides that if an injured employee, or in case of death, his dependents, has taken compensation, but has failed to commence action against the negligent person within a specified time, such failure shall operate as an assignment of the cause of action against such negligent person to the insurance carrier liable for the payment of compensation.

It is the well and firmly established law of New York that after such assignment the injured person has no inter-

est in the cause of action as such and that no action thereon can be brought by the injured person or in his name.

Taylor v. *New York Central R. Co.*, 294 N. Y. 397, 402, certiorari denied 326 U. S. 786.
Skakandy v. *State of New York*, 274 App. Div. 153, affirmed 298 N. Y. 886.
Commissioners of State Insurance Fund v. *E. T. Clark Carting Co.*, 274 App. Div. 559.
Eisenberg v. *Louis Adler Realty Co.*, 273 App. Div. 641, affirmed 299 N. Y. 572.

The petition for writ of certiorari herein conceded that under Section 29, as amended, of the New York Workmen's Compensation Law, Vambell's cause of action was automatically assigned to respondent upon Vambell's failure to commence an action against the United States within nine months after the passage of the Federal Tort Claims Act (Petition, p. 11).

Accordingly, it is obvious that Vambell can no longer bring an action against the United States and that if respondent's action be held barred by R. S. 3477, no one can sue the United States for its tort and the United States is unjustly enriched.

Nevertheless, petitioner refuses to recognize this clear and simple proposition. Petitioner's brief is based upon the fallacious contention that this action can be brought in Vambell's name. Upon such a false premise, petitioner concludes erroneously that invoking R. S. 3477 to bar respondent's action will not prejudice any substantial rights of respondent.

Petitioner's brief states (p. 13) that the question involved is whether under R. S. 3477 the Government may require an insurance carrier claiming under statutory assignment to sue and recover in the name of the original claimant.

This is designed to make it appear that only a procedural question is involved, whereas in fact, the Government's proposition would effectuate the destruction of a

substantive right vested in the insurance carrier by New York statute, because respondent cannot sue in Vambell's name.

Petitioner's brief also states (p. 13): "The reversal of the lower court decisions in these cases cannot ultimately defeat the insurance carriers' substantive rights. The Act of April 25, 1949, c. 92 (P. L. 55, 81st Cong.), has amended the limitation provision of 28 U. S. C. 2401(b) so that at any time before April 25, 1950, the original claimants may be joined as additional parties or new actions brought in their names."

Obviously, this is not true in the instant case because: by Section 29 of the New York Workmen's Compensation Law Vambell's cause of action has been assigned in toto to respondent; no action can be brought in Vambell's name; he has no interest in the cause of action as such to give him any standing in court as a party plaintiff; and if respondent cannot sue in its own name, no one can sue and respondent is deprived of substantive rights.

Furthermore, while petitioner in this case, No. 35 of this calendar, seeks a dismissal of the complaint against this respondent-insurance carrier, the only one who could bring the action—and while in case No. 36 petitioner asks that that cause be remanded with instructions to the Trial Court to modify the original judgment giving the entire recovery to the original claimant, and while in cases No. 37 and 38 the petitioner asks that the cause be remanded with instructions to consolidate the actions, yet (in a footnote, No. 2, at p. 13, bottom, of petitioner's brief) it is subtly suggested that "the reversal of the lower Court decisions in these cases cannot ultimately defeat the insurance carriers' substantive rights".

Nothing is further from the truth.

The extension of time to April 25, 1950, provided by the Tort Claims Act, to bring suit can only be available to one who under state law can bring the suit. It is only the respondent—subrogee, assignee by operation of law—who owns the cause of action and all rights to maintain it. This

respondent was given these rights by the New York State law upon the expiration of the nine-month period following the passage of the Tort Claims Act within which the injured could have sued.

Since the injured Vambell failed to exercise his right to sue within the nine-month period as aforesaid, his rights were automatically and irrevocably transferred to the respondent who thus became the subrogee-assignee by operation of law. Therefore, a reversal in this case, No. 35, means a dismissal against the only party who can sue herein—an absolute destruction of the substantive rights of the only one who can be a proper plaintiff in the action.

Again, petitioner's brief states (p. 15) that the liabilities of the United States should be discharged and the fiscal interests of the Government should be protected by requiring derivative claimants to bring their suits under the Tort Claims Act in the names of the original claimants.

Since, in the instant case, suit cannot be brought in the name of Vambell, the original claimant, the liability of the United States will not be discharged if the action cannot be brought by and in the name of the respondent.

Petitioner's brief states (p. 15) that respondent would be able to protect its rights by intervening or joining in a suit brought by Vambell, the original claimant, so as to obtain a direction which would require the original claimant upon receipt of payment of the judgment entered in his name, to repay to respondent whatever sum the respondent was subrogated to.

Obviously, that could not be done in the instant situation. No judgment could be rendered in favor of Vambell, the original claimant, because his entire cause of action was assigned by law to respondent and Vambell had no cause of action.

Petitioner's brief states (p. 44) that the instant case does not fall "into the category of cases where the legal status of the original claimant is changed, so that unless the representative or successor is allowed to prosecute the

claim, the United States will be unjustly enriched by escaping liability for the tort of its employee,—".

That is obviously incorrect. The legal status of Vambell has been changed insofar as the cause of action is concerned. It has been taken from him and given to respondent. Therefore, unless the respondent is permitted to sue the United States, the latter will be unjustly enriched.

Petitioner's brief states (p. 60) that if the injured workman should fail to bring an action, the insurance carrier is fully able to protect its derivative right under the state law by bringing an action against the United States in the name of the workman.

That is incorrect. An action brought in the name of the injured workman, after his cause of action has been assigned by Section 29 to the insurance carrier, would have to be dismissed, because the injured workman has no cause of action. It belongs to the insurance carrier. Furthermore, the procedure and practice do not permit any action by the injured workman to the use of the insurance carrier. There is but one cause of action which, by virtue of Section 29, belongs entirely to the respondent insurance carrier and the action must be brought by and in the name of the respondent as the owner of the cause of action and the real party in interest (Rule 17(a), Federal Rules of Civil Procedure; 3 *Moore's Federal Practice*, 2d Ed., 1948, ¶ 17.09, p. 1350).

In the Court below, where the petitioner contended that the respondent was not the real party in interest, the Court said:

> "Plaintiff is the only real party in interest. The New York statute gives it alone the right to sue, even though it may have to account for part of the recovery to the injured employee. To the extent the plaintiff must turn over its recovery to another it is a 'party authorized by statute' to sue in its own name, expressly designated the 'real party in interest' by Rule 17. None of the cases cited by the Government involved plaintiffs so clearly authorized by statute to bring the action" (R. 21, 22).

Upon the incorrect assertion that an action can be maintained in Vambell's name and that respondent will not lose any substantive rights, petitioner requests that R. S. 3477 be interpreted to bar this action. On the other hand, it is clear that to invoke R. S. 3477 as a bar would deprive respondent of substantive rights and unjustly enrich the United States because no action can be brought in Vambell's name and if respondent cannot maintain this action, then no one can sue the Uited States on this tort claim.

Petitioner's brief cites *United States* v. *American Tobacco Co.*, 166 U. S. 468 (affirming 32 Ct. Clms. 207), throughout, for the proposition that suit should be brought in the name of the original claimant in the "traditional" manner followed under the Tucker Act. In that case the Tobacco Co. had the legal title to the claim, the carriers having only an equitable interest. In this case the respondent has the legal title to the entire claim. Under the law of New York only the respondent can sue on this cause of action. No action can be brought in Vambell's name. Therefore, the *American Tobacco Co.* case has no application to this case.

The Tort Claims Act provides that the United States shall be liable in the same manner and to the same extent as a private individual under circumstances where such private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred (28 U. S. C. 2674, 1346(b)). The negligent act here involved occurred in New York. Under the law of that state a private person would be liable to respondent under the circumstances of this case (conceded in Petition, top of p. 12). Accordingly, the petitioner is liable to the respondent in the instant case.

In spite of the protestations of the Government that it does not seek to avoid responsibility, such is the inevitable result of the position it takes in this case. On the one hand, the respondent would not be allowed to sue and, on the other hand, a plaintiff would be substituted who by operation of state law has no cause of action and no right to sue. Thus, in one fell swoop, both the purposes of the

New York State Legislature and of the Congress of the United States would be frustrated.[1]

POINT II

The Anti-Assignment Act, R. S. 3477, 31 U. S. C. 203, does not apply to the instant case because the assignment of Vambell's cause of action was by operation of law and involuntary. The purpose of R. S. 3477, to prevent fraud upon the Government and the embroilment of the Government in conflicting claims, has no applicability to the instant case.

At common law there can be no assignment of a claim or cause of action for personal injuries. Obviously, the anti-assignment statute (R. S. 3477, enacted June 22, 1874, derived from Act July 29, 1846, c. 66, 9 Stat. 41, and Act February 26, 1853, c. 81, sec. 1, 10 Stat. 170) was not enacted to bar claims that could not be assigned in any event. Before the Tort Claims Act of 1946, the Government could not be sued on common law tort claims. The words of R. S. 3477: "All transfers and assignments made of any claim" encompass only claims of a nature which were within the contemplation of Congress and the existence of which were recognized. Accordingly, it is clear that R. S. 3477 was intended to apply only to contract claims against the Government, such as could be presented to some depart-

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[1] Petitioner's attorneys have shifted their positions and changed their arguments whenever they deemed it to their advantage in order to thwart the purposes of the Tort Claims Act and to restrict its application. An illustration is *Van Wie* v. *United States*, 77 F. Supp. 22, where an administratrix sued to recover for the wrongful death of her decedent and for property damage to decedent's motor vehicle. Petitioner contended, unsuccessfully, that the administratrix was not the real party in interest and that, since under Rule 17(a) a party cannot sue to the use of another who is sui juris, the action had to be maintained by two subrogee insurers which had paid compensation benefits and indemnification for the property damage.

ment or officer for payment, or prosecuted in the Court of Claims.

In *Hobbs* v. *McLean*, 117 U. S. 567, 575, this Court said:

> "R. S. 3477, it is clear, only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment or may be prosecuted in the Court of Claims."

It is submitted that R. S. 3477 cannot now be used to bar an assignment of a tort claim without distorting and stretching its purpose and its plain meaning.

It has been established by a long line of decisions of this Court that, even with respect to contract claims, R. S. 3477, 31 U. S. C. 203, applies only to voluntary assignments and not to involuntary transfers by operation of law.

Erwin v. *United States*, 97 U. S. 392, 397.
Goodman v. *Niblack*, 102 U. S. 556, 560.
Bailey v. *United States*, 109 U. S. 432, 438.
Butler v. *Goreley*, 146 U. S. 303, 311, 312.
Price v. *Forrest*, 173 U. S. 410, 421, 423.
Western Pacific Co. v. *United States*, 268 U. S. 271, 275.

Thus by the language of the statute and by the decisions of this Court it is clear that R. S. 3477 applies only to voluntary assignments of contract claims and cannot be applied to an assignment by operation of law of a tort claim.

That the assignment of Vambell's cause of action to the respondent was involuntary is indisputable. The petitioner conceded (Petition, p. 11)[2] that when Vambell failed to

[2] The petition for writ of certiorari reads at page 11:

> "1. Under Section 29, as amended, of the New York Workmen's Compensation Law, Vambell's cause of action was automatically assigned to respondent upon Vambell's failure to commence an action against the United States within nine months after the passage of the Federal Tort Claims Act."

commence an action against the United States within the time limited by Section 29 of the New York Workmen's Compensation Law, that statute operated automatically to assign his cause of action to the respondent.

Nevertheless, petitioner's brief (p. 40) and the petition for writ of certiorari (pp. 13, 14) attempt to cast some doubt on the involuntary nature of the assignment by saying that the contract of insurance was voluntarily entered into, that Vambell chose to accept compensation and to permit the assignment of his claim to respondent by failing to institute action himself, and that, therefore, the transfer was voluntary.

The only insurance contract involved was one between Vambell's employer and respondent. The employer was required by the New York Workmen's Compensation Law to provide compensation insurance for his employees. Furthermore, Vambell's acceptance of compensation and failure to sue the United States within the time limited by Section 29 did not render the transfer voluntary. Petitioner fails to distinguish between the voluntary making of an assignment and the performance or omission of an act which, by reason of its legal consequences, results in a transfer of the claim. In the latter situation it has been decided, time and again, that the transfer was not voluntary and not within the purview of R. S. 3477.

Goodman v. *Niblack*, 102 U. S. 556, voluntary assignment for benefit of creditors.

Erwin v. *United States*, 97 U. S. 392, voluntary petition in bankruptcy.

Butler v. *Goreley*, 146 U. S. 303, deed of assignment in voluntary insolvency.

Western Pacific Co. v. *United States*, 268 U. S. 271, claim acquired through a judicial sale.

As was stated in the opinion below:

"What is more, the assignment in this case is not voluntary; the claim passed to plaintiff, regardless of

> Vambell's intent or even of his knowledge that, by delaying, he lost his rights, * * *" (R. 20).

It is clear, therefore, that the assignment in the instant case was involuntary and by operation of law.

As we have shown, *supra*, according to the New York Workmen's Compensation Law, after such assignment, Vambell no longer had any cause of action and no action could be brought by him or in his name.

> *Taylor* v. *N. Y. Central R. Co.*, 294 N. Y. 397, 402, certiorari denied 326 U. S. 786.
>
> *Skakandy* v. *State of New York*, 274 App. Div. 153, aff'd 298 N. Y. 886.
>
> *Commissioners of the State Insurance Fund* v. *E. T. Clark Carting Co.*, 274 App. Div. 559.
>
> *Eisenberg* v. *Louis Adler Realty Co.*, 273 App. Div. 641, aff'd 299 N. Y. 572.

Thus the assignment to the respondent made the respondent the only one who could bring the action against the United States. If such action were now held to be barred by R. S. 3477, then no one can prosecute the claim against the United States and the United States is unjustly enriched.

The petitioner's brief (pp. 59, 60) seeks to soften the effect of this by saying that there is adequate provision for indemnification of insurance carriers because Section 29 of the New York Workmen's Compensation Law gives the carrier a lien on any recovery had in an action brought by the injured workman. But, if no action be brought by the injured workman, there is nothing to which a lien may attach. It is for this very reason that the New York Legislature provided that, if the injured person did not sue the negligent third party within a certain time, his cause of action should be assigned to the insurance carrier.

Since the assignment was involuntary and by operation of law, the Court of Appeals for the Second Circuit correctly decided that R. S. 3477 does not bar the respondent's action.

That R. S. 3477 does not bar claims under the Federal Tort Claims Act by subrogees or assignees by operation of law has been decided by a number of other Courts of Appeals and by a number of District Courts.

United States v. *South Carolina State Highway Dept.*, 4 Cir., 171 F. 2d 893.
Old Colony Ins. Co. v. *United States*, 6 Cir., 168 F. 2d 931.
Employers' Fire Ins. Co. v. *United States*, 9 Cir., 167 F. 2d 655.
National American Fire Ins. Co. v. *United States*, 9 Cir., 171 F. 2d 206.
Yorkshire Ins. Co. v. *United States*, 3 Cir., 171 F. 2d 374.
United States v. *Chicago, Rock Island & Pacific Ry. Co.*, 10 Cir., 171 F. 2d 377.
State Farm Mut. Liability Ins. Co. v. *United States*, 1 Cir., 172 F. 2d 737;
Niagara Fire Ins. Co. v. *United States*, D. C., S. D. N. Y., 76 F. Supp. 850.
Wojciuk v. *United States*, D. C., E. D. Wis., 74 F. Supp. 914.

The only Court of Appeals decision to the contrary is *United States* v. *Hill*, 5 Cir., 171 F. 2d 404. However, on rehearing, that decision was modified (*United States* v. *Hill*, 174 F. 2d 61).

The original majority opinion, 171 F. 2d 404, conceded that R. S. 3477, 31 U. S. C. 203, applied only to voluntary assignments and did not apply to transfers of title by operation of law. However, the majority concluded that the subrogation resulted from the voluntary acts of the parties and constituted a voluntary assignment. The Court, therefore, set aside the judgments appealed from and remanded the cause with directions to enter judgments against the United States in favor of the original claimants, ignoring the claim of the subrogee, State Farm Insurance Co. Hutcheson, C. J., dissented, holding that the Anti-Assignment Act did not bar the subrogee's claim.

On reargument (*United States* v. *Hill*, 174 F. 2d 61) the Court in bank stated that the original opinion would stand as expressing the views of the majority of the Court respecting the applicability of 31 U. S. C. 203, R. S. 3477. Nevertheless, the last three sentences of the opinion were withdrawn and two paragraphs substituted to the effect that, all the original claims being in court, "there was no error in refusing to dismiss the insurer out of the case here". The Court reformed the judgment to provide that each of the original claimants should recover the full amount of his claim and that the insurer should, in turn, be paid out of the net recovery of each original claimant. As so corrected, the judgment was affirmed. Hutcheson, C. J., who had dissented from the original opinion, concurred in the result, stating that he was still of the opinion that the judgment appealed from in no manner violated the Anti-Assignment Act, but, since the judgment was now affirmed, instead of reversed, he was able to concur in the result as in substantial accordance with the views his dissent expressed.

We believe that the opinion of the majority of the Court of Appeals for the Fifth Circuit, to the effect that the subrogation resulted from the voluntary acts of the parties and constituted a voluntary assignment, is erroneous and resulted from a failure to distinguish between a voluntary assignment and an act or omission, which, by reason of its legal consequences, causes a transfer by operation of law.

Thus six of the seven circuits who have considered the question have determined that R. S. 3477 is no bar to claims by subrogees or assignees by operation of law.

In the instant case the assignment of Vambell's cause of action to the respondent was by operation of law and involuntary. Therefore, respondent's claim is not barred by R. S. 3477.

Despite the well-established principle that R. S. 3477 does not apply to involuntary assignments, the petitioner contends (Brief, p. 24) that R. S. 3477 should be applied, whether the assignment be voluntary or involuntary,

wherever it is necessary to effectuate the purpose of R. S. 3477 to prevent fraud upon the Government and to avoid the Government's becoming embroiled in conflicting claims.

The reasons for the enactment of the Anti-Assignment Act, which in the Act of February 26, 1853, 10 Stat. 170, was entitled "An Act to Prevent Frauds upon the Treasury of the United States", clearly indicate that said Act should not apply to a case like the one at bar. This Court in *Goodman* v. *Niblack*, 102 U. S. 556, 559, 560, stated that the mischiefs designed to be remedied by the statute were:

> "First. The danger that the rights of the Government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.
>
> Second. That, by a transfer of such a claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts or the Congress as desperate cases when the reward is contingent on success, so often suggest."

In the instant case, the respondent, the only one in interest, the only one owning the cause of action, is the only one who can make the claim as demonstrated above. Vambell, the injured party, had lost all his interest in the cause of action when he failed to bring his action within the time provided therefor by the Workmen's Compensation Law of New York. Under the first test, no claim can be maintained by the party who lost all his rights in the cause of action to the respondent, the insurance carrier. Therefore, the Government will have to deal with only one person, the respondent herein. Thus there is no danger that its rights will in this case be embarrassed by having to deal with several persons.

Under the second test, it cannot be urged by the petitioner that the respondent insurance company was brought into the case as plaintiff, in place of the original claimant,

because of any belief that the respondent would be able to exercise influence in the collection of this claim. Clearly the mischief sought to be prevented under the second test knocks out any thought that this Act was intended to cover a case like this where neither the original claimant nor the assignee by operation of law did anything voluntarily to create the assignment, but rather the transfer of interest in the cause of action was due to the automatic operation of the New York Workmen's Compensation Law. Neither the assignor nor the assignee "brought in" the respondent. The law did.

Now, let us take the language of the Anti-Assignment Act which petitioner asked be read literally. It requires the following:

1. That the assignment shall be "freely made and executed in the presence of at least two attesting witnesses". How is an automatic assignment by operation of the Workmen's Compensation Law, transferring a cause of action of an injured party to the compensation carrier, to be "made and executed in the presence of at least two attesting witnesses"? The very language of this statute indicates it referred to the type of assignment that is reflected in the execution of a document by the assignor and thus capable of being witnessed by two witnesses.

2. Further, it is to be made "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof". Can it be sincerely urged by petitioner that the automatic operation of the law, which passes a claim to an insurance carrier upon the failure of the injured to take action, is such a claim as can be computed and ascertained as to the amount due at the time of such assignment by operation of law? Is this the kind of a claim for which a warrant for the payment thereof (by the Government, of course) is required as of the instant the law automatically transfers ownership of the claim to the insurance carrier?

It is too obvious to require much comment that at the time of the transfer of interest in the cause of action from the injured party to the compensation insurance carrier it was impossible for the amount due on the cause of action to have been ascertained, for the claim to have been allowed and for any warrant for the payment thereof to have been issued. The type of assignment involved in this case, viewed in the light of the procedure set forth in the Anti-Assignment Act, clearly establishes that such an assignment by operation of law was never within the scope of the Anti-Assignment Act.

Petitioner's brief (pp. 12, 13) says that the Government invokes the bar of R. S. 3477 against suits by insurance carriers in their own names *solely* for two reasons: (1) to insure that the United States may avoid involvement in any litigation as to the existence or extent of subrogation or other assignment of such claims; and (2) to insure that the suits and any judgments against the United States will be in the names of the original claimants so that the United States will be able to avail itself of its statutory rights in respect of venue, and of any counterclaims and off-sets it may have against the original claimants.

Neither reason has any force nor any applicability to the instant case. As to the second alleged reason, we shall show, *infra*, that the Government is not deprived of any rights as to venue, counterclaim, or off-set in the instant case or in any action by an assignee or subrogee. As to the first alleged reason, we believe it is manifest that it has no application to the instant case and furnishes no cause for departing from the principle that R. S. 3477 does not apply to involuntary transfers.

In the instant case, Vambell's entire cause of action was assigned to the respondent by operation of law and the respondent is the only one with whom the Government has to deal (*Aetna Life Ins. Co.* v. *Moses*, 287 U. S. 530). Therefore, there is no danger of fraud, no danger of multiplying the number of persons with whom the Government has to deal, no danger of the Government becoming embroiled

in conflicting claims, and no danger of involvement in litigation as to the existence or extent of assignment of the claim.

The petitioner also contends (pp. 40, 41) that R. S. 3477 has been held inapplicable only where there is but one person with whom the Government has to deal, such as a trustee or executor; that in those cases the Government can deal with the successor in the same manner as it would have dealt with the original claimant, without the harassment of conflicting claims; and that in those cases it is necessary to withdraw the transfer from the operation of R. S. 3477 "to prevent unjust enrichment to the United States by way of windfall". That is the exact situation in the instant case. The respondent is the only one with whom the Government has to deal and can deal. The Government can deal with the respondent just as it would have dealt with Vambell had he instituted a timely action. And if R. S. 3477 be held to bar this case, the United States will be unjustly enriched by windfall.

We do not believe it necessary to devote much space arguing against petitioner's contention that R. S. 3477 should be invoked in order to avoid the necessity of the Government maintaining an effective filing and index system. That was a matter for Congress to consider and the intent of Congress in enacting the Tort Claims Act and granting important substantive rights to *all* claimants should not be thwarted because of this alleged administrative difficulty.

The complaint of the petitioner that new and difficult administrative problems will be created for the Attorney General and the Comptroller General should subrogees and assignees by operation of law be permitted to sue, should be viewed in the light of the fact that under other and prior statutes they have admitted, allowed and paid claims of subrogees and assignees by operation of law, including insurance carriers as subrogees, and the Attorney General and the Comptroller General have both approved of such

conduct. (See 36 Op. Atty. Gen. 553, referring to the "Small Torts Claims Act", 42 Stat. 1066, 31 U. S. C. 215; 19 Comp. Gen., p. 504, approving subrogees' claims against W. P. A. under the Emergency Relief Act, 53 Stat. 936; 21 Comp. Gen. 341; 22 Comp. Gen. 611.)

Furthermore, in this case there is no difficulty in guarding against duplication. In this case the insurance carrier has to state the name of the injured party to whose rights it has succeeded. The petitioner need only make a record of the name of Vambell, the injured, in connection with this case. One more card containing Vambell's name cross-indexed to the name of the Aetna, the respondent, subrogee-assignee by operation of law, is all that is required to prevent duplication. Besides, if Vambell brought any suit, he could not recover since the time within which he could have sued, as provided by New York law, had elapsed. Thus, by looking up the New York law, which created the substantive rights, and checking the relevant dates, petitioner would be able to dismiss any action brought by Vambell.

The difficulty anticipated by the petitioner is largely imaginary. There is only one example of confusion cited in petitioner's brief (*Old Colony Ins. Co.* v. *United States*, 168 F. 2d 931). The facts concerning this matter are not in the record.[3] However, we have been informed that the Government's version is incorrect, that the insurance company's counsel not only advised the Government of the receipt of the check, but offered to return it if the Government wanted to apply for a writ of certiorari; but the Government stated it would not apply for certiorari and consented that the check be retained and used so that the case could be dismissed when it was remanded to the District Court.

All of this, of course, has no application to the instant case where the United States has only the respondent to deal with, Vambell having lost his cause of action by the

[3] It is improper and a breach of professional propriety to assert as facts matters not in the record. Such matters cannot be taken into consideration. *Schley* v. *Pullman Company*, 120 U. S. 575, 578

operation of Section 29 when he failed to bring a timely action.

The petitioner makes an abortive attempt to indicate that even in cases such as the instant case there is a possibility of conflicting claims and cites *Liberty Mutual Ins. Co.* v. *American Incinerator Co.*, 51 F. 2d 739, and *United States F. & G. Co.* v. *Graham and Norton Co.*, 254 N. Y. 50, for the proposition that the carrier is not assigned the right to prosecute the complete claim in every case. Those cases do not refer to personal injury actions, like the instant case, where there is no doubt the entire claim is assigned (*Taylor* v. *N. Y. Central R. Co.*, 294 N. Y. 397, 402). They refer only to such death actions where the dependents who accepted compensation do not comprise all the next of kin for whose benefit the death action exists. Those cases held that in such a situation Section 29 did not apply, the cause of action for wrongful death was not assigned and the action had to be brought by the administrator (cf. *Lappin* v. *National Container Corp.*, 179 Misc. 109, 37 N. Y. S. 2d 800).

The petitioner also suggests that Section 29 might not operate on the entire claim in a hypothetical situation where an injured employee might have rights of compensation under the law of New York, where he was employed, and the law of another state, where the injury occurred. Ordinarily, in the absence of special circumstances, the final award by one state will bar an additional award by another state (*Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430). But even if two awards be made and the law of the other state differ from Section 29, there will be no conflict, because the employee's application for and acceptance of compensation from New York will cause Section 29 to operate to transfer the entire cause of action to the insurance carrier.

Likewise, *Commissioners of State Insurance Fund* v. *United States*, S. D. N. Y., 72 F. Supp. 549, 76 F. Supp. 850, 853, merely establishes the respondent's contention that the Government is not confronted by conflicting claims. It was held in that case that where the time limit within

which the injured employee might institute action has not passed, he owns the cause of action and is the only one who may sue, but when the time limit has passed, his cause of action has been transferred to the insurance carrier, which is the one who may sue.

Petitioner also cites, incorrectly, *Commissioners of State Insurance Fund* v. *Farrand*, 295 N. Y. 493, as deciding that the mere institution of suit by the original claimant is not enough to bar assignment to the insurance carrier. The actual holding in that case is that the institution of suit by the injured workman against one tort feasor does not bar the assignment of the cause of action against another tort feasor.

The true situation in the instant case, and in cases like it, is that up to a certain date the injured workman has a cause of action against the United States; but if he fails to institute such action by that date, then automatically the complete cause of action is transferred to the insurance carrier, which is the only one who can thereafter prosecute the action. Such action must be prosecuted in the name of the insurance carrier or not at all.

We respectfully submit that R. S. 3477 does not apply to the instant case because the assignment was by operation of law and involuntary. Furthermore, the purpose of R. S. 3477 to prevent fraud on the Government and to avoid its being embroiled in conflicting claims has no applicability to the instant case.

POINT III

The test of the right of the respondent to maintain this action is whether the respondent would have a cause of action under the law of New York if the petitioner were a private person.

The Tort Claims Act states:

> "* * * the United States shall be liable in respect of such claims to the same claimants, in the same

manner and to the same extent as a private individual under like circumstances, • • •" (Tort Claims Act, Sec. 410(a); 28 U. S. C. 2674).

Since it is undisputed that if the negligent act herein had been committed by a private person, respondent would have, under the law of New York, a cause of action against such person, it follows that under the words of the Tort Claims Act, the respondent has a right to maintain this action against the petitioner.

There is no question but that respondent's claim comes within the language of the Tort Claims Act. The complaint alleges that Vambell was injured by the negligence of employees of the United States, by reason of which he was damaged in the sum of $20,000 (R. 2, 3); and that by his failure to commence timely action against the United States (R. 3) and his taking of compensation, his claim and cause of action was assigned to respondent (R. 4). As stated in the opinion of the Court below: "Plaintiff's claim is founded on, limited by, and substituted for, Vambell's claim for personal injury" (R. 20). The claim sued upon is for money damages for personal injuries caused by the negligence of employees of the United States under circumstances where the United States, if a private person, would be liable to respondent, the claimant.

As an additional reason for holding that R. S. 3477 did not bar the respondent's claim in the instant case, the Court below stated: "• • • we think the language and purpose of the Tort Claims Act more than sufficient to carve out an implied exception for this type of claim" (R. 20). While the grounds which had already been assigned by the court below for sustaining respondent's right to maintain this action were amply sufficient, nevertheless, we believe this last statement of the Court is justified by the broad language of the act, the plain meaning of its words, the intent of Congress, the historical background of the act and the reasons which led to its enactment.

Employers' Fire Ins. Co. v. *United States*, 167 F. 2d 655.

Niagara Fire Ins. Co. v. *United States*, 76 F. Supp. 850.

Wojciuk v. *United States*, 74 F. Supp. 914.

In contending that the Court below erred in making the above statement, the petitioner says that the language and purpose of the Tort Claims Act are fully served if the person originally damaged can maintain the action. The petitioner also contends that the Tort Claims Act did not repeal R. S. 3477 in terms or by necessary implication and that such an implied exception to R. S. 3477 constitutes a repeal by implication which should not be invoked because the purpose of the Tort Claims Act will be fully served by permitting suit only by the person originally sustaining the loss or injury. Petitioner's contentions cannot be substantiated.

We have shown that Vambell, the person originally damaged, cannot maintain the action. Therefore, according to the petitioner's own contention, the purpose of the Tort Claims Act is not served if R. S. 3477 were to be held to bar the instant action.

The broad language and the purpose of the Tort Claims Act warrant the conclusion that Congress intended that claims by subrogees and assignees by operation of law should be permitted and should not be barred by R. S. 3477. Unless the repugnancy between two statutes is plain and unavoidable, they should be so construed as to give effect to both.

Posadas v. *National City Bank*, 296 U. S. 497, 503.

The intent of Congress and of the Tort Claims Act and of the Anti-Assignment Act will be given effect by construing the Anti-Assignment Act as it has been for many years—as not applying to assignments by operation of law.

Congress must have known about the Anti-Assignment Act and must have believed that it would not apply to

tort claims and to claims by subrogees or assignees by operation of law.

The effect of the Government's contention that the respondent, an assignee by operation of law, is barred creates an additional exception to the twelve exceptions already set forth in the Tort Claims Act (28 U. S. C. 2680). If Congress intended to make such an exception it would have said so.

In *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 656, 657, the opinion says:

> "In the Federal Tort Claims Act, Congress, though granting jurisdiction generally to the Federal Courts to render judgment on 'any claim', designated twelve categories of claims to which the Federal Tort Claims Act was not meant to apply. Claims of subrogees were not included therein. Had Congress intended to exclude subrogated claims, it would have undoubtedly designated them as one of the categories which the Act was not meant to cover. * * *
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> * * * * * * *
>
> "The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions resort to that rule cannot be had in order to enlarge the exceptions."

Petitioner's brief (p. 48) states that it seems hardly likely that Congress intended that the persons who might sue the United States on the claim of another should depend on the particular variations of local State law. However, that is the very intent of Congress, as shown in the express language of the Tort Claims Act which says that the United States shall be liable to *any* claimant in the same manner and to the same extent as a private person under circumstances where such private person would be liable to the claimant in accordance with the law of the state where the act or omission occurred.

The petitioner's brief also contends (pp. 52, 53) that the State law governs only whether an actionable wrong was committed, but that *who may sue* is governed by the law of the federal forum, and the law of the federal forum is R. S. 3477. That contention is likewise incorrect. The cited case of *State of Maryland, to use of Burkhardt* v. *United States,* 165 F. 2d 869, merely holds that the provisions of the Tort Claims Act itself govern the time within which the death action shall be brought. The cited case of *Montgomery Ward & Co.* v. *Callahan,* 127 F. 2d 32, merely holds that the procedural question of whether the action on behalf of an incompetent might be brought by a next friend or guardian ad litem, or had to be brought by a legally appointed guardian, was determined by the law of the forum, viz., Rule 17(c) of the Federal Rules of Civil Procedure.

However, the question involved in the instant case is not procedural but a question of substantive law, i.e., who owns the cause of action and who may enforce it. A cause of action inherently includes the right to maintain an action thereon. *Travelers Ins. Co.* v. *Padula,* 224 N. Y. 397, 405. A right of action belongs to the person who has a right to prosecute it and the right of a specified person to maintain an action is as integral to the right of action as the liability of the defendant. *Matter of Meng,* 227 N. Y. 264, 277; *Baldwin* v. *Powell,* 294 N. Y. 130, 132.

Under the law of New York, the respondent could maintain a similar action against a private person. Therefore, pursuant to the very words and intent of the Tort Claims Act, the respondent should be permitted to maintain this action against the United States. A totally different statute, R. S. 3477, by its terms, meaning and purpose inapplicable to the instant case, should not be interpreted and stretched so as to bar this action.

POINT IV

The petitioner's contention that R. S. 3477 should now be interpreted so as to bar this action on an involuntarily assigned claim, because the petitioner anticipates that it may have certain hypothetical, procedural difficulties in other cases, has no merit. No valid reason has been presented by the petitioner for upsetting the proposition, which has been so well established by a long line of decisions of this Court, that R. S. 3477 does not apply to transfers by operation of law.

At the outset, we desire to point out that petitioner's brief discusses many matters which have no connection with the facts of the instant case, nor with the law applicable thereto. Petitioner's brief raises in general many imaginary horribles which it fears might arise in different cases and in different situations, such as where the plaintiffs are partial subrogees and the original claimants still retain ownership of parts of the claim, where the Government might be required to defend several actions in several jurisdictions on different parts of the same claim, or where the Government might have cross-claims, counterclaims or off-sets against the original claimants. None of this, of course, has any application to the instant case. This case should be decided on the facts of this case alone.

The petition for writ of certiorari herein conceded that the language of the Tort Claims Act was sufficient to make the United States subject to actions on tort claims by subrogees or assignees (Petition, p. 8). Nevertheless, the petitioner adopts the contradictory position of contending that the interests of the Government require that R. S. 3477 be so interpreted as to prevent such claims. The reasons advanced for such contention are that, otherwise, (1) the Government would be subject to the possibility of multiple suits; (2) venue would be permitted in a district other than that in which the original claimant could have

sued; (3) the Government's right of counterclaim and off-set would be impaired; and (4) provisions of state workmen's compensation statutes might be in conflict with and override the provisions of federal law.

The petitioner states that the avoidance of these difficulties is of great importance to the United States, whereas it is of no great moment to the insurance carriers that they be permitted to sue in their own names. The respondent disagrees, most emphatically, with that statement. We have shown that unless the respondent herein can maintain this action in its own name, the respondent will be deprived of substantive rights, because action cannot be maintained by Vambell or in his name.

The Government would have the Court believe that procedural difficulties of minor importance outweigh the irreparable destruction of valuable substantive rights.

The difficulties anticipated by the petitioner are entirely hypothetical. Moreover, they are procedural and can be easily avoided by the application of the available procedural remedies, such as consolidation of causes, joinder and addition of parties, change of venue, etc. On the other hand, to deny to the insurance carriers the right to sue as subrogees or assignees by operation of law will, in many instances, deprive them of substantial rights and of any indemnification for the losses which they have paid.

(A) Insofar as the instant case is concerned, the four reasons advanced by the petitioner have neither applicability nor merit.

As we have demonstrated, the first hypothetical difficulty that the Government might be subjected to multiple suits, is not involved in the instant case, since Section 29 of the New York Workmen's Compensation Law has operated to assign the entire cause of action to the respondent.

The second alleged difficulty—as to venue—is really no difficulty at all. 28 U. S. C. 1402(b) provides that a tort claim against the United States under subsection b of Sec-

tion 1346 must be prosecuted only in the district where the plaintiff resides or wherein the act or omission complained of occurred. 28 U. S. C. 1404(a) provides that for the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought. Therefore, the District Court may change the venue of the case to the district wherein the act or omission complained of occurred—and the Government will not be faced with any difficulty of attempting to defend a case in a district far removed from the place of the occurrence.

The third alleged difficulty of which the Government complains, viz., that a right of counterclaim or off-set might be lost, is purely hypothetical and non-existent in the instant case. The Government has no counterclaim or off-set against Vambell, the injured person, and merely presents an academic proposition in no way related to this case.

The fourth alleged difficulty, that there will be imposed on the prosecution of the claim all the incidents of the New York Workmen's Compensation Law and that said statute is in conflict with the Federal Tort Claims Act with respect to attorneys' fees, is likewise non-existent. There is no conflict.

Section 29 of the New York Workmen's Compensation Law permits the insurer to retain one-third of the amount recovered in excess of the total amount of compensation awarded, plus medical expenses and expenses incurred in effecting such recovery. The Tort Claims Act (28 U. S. C. 2678) restricts attorneys' fees to 20 percent of the recovery. The petitioner contends that, therefore, the two acts are in conflict. There is no conflict at all. First, the amount of recovery might not exceed the total amount of compensation payable by the insurer. Second, the amount of attorneys' fees, if any, charged as an expense of recovery, would have to be within the limit of 20 percent permitted by the Federal Tort Claims Act. Third, if the recovery were to exceed the compensation payable, plus medical expenses,

and expenses incurred in effecting such recovery, the one-third of such fees retained by the insurer would not represent attorneys' fees. That amount represents compensation to the insurer for its efforts in effecting the recovery. Consequently, there is no conflict between Section 29 of the New York Workmen's Compensation Law and the Tort Claims Act. In any event, the terms of the Tort Claims Act, limiting attorneys' fees to 20 percent of the recovery, would prevail, and in any such action the attorneys' fees would be limited accordingly.

It is clear, therefore, that, insofar as the instant case is concerned, the reasons which the Government considers so important as to require R. S. 3477 to be interpreted contrary to the manner in which it has been interpreted for so many years, are of slight or no importance. They have no applicability to the instant case.

(B) Likewise, the petitioner's said reasons have neither merit nor importance in general and present no valid ground for barring generally all claims by subgrogees or assignees by operation of law.

The first difficulty—the problem of multiple claims—can arise only where there has been subrogation of part of a claim. However, any such problem is easily solved by applying the procedural remedies of consolidation or adding parties provided by the Federal Rules of Civil Procedure. The purpose of R. S. 3477 to prevent fraud and to avoid the Government being embroiled in conflicting claims is not frustrated by the fact that several claims may be made on parts of one claim. The claims are not conflicting but are supplementary to each other.

The second alleged difficulty—the problem of venue—is likewise over-emphasized by the Government. Even if a number of suits were brought in different districts by various partial subrogees, the venue provisions of the Judicial Code (28 U. S. C. 1404(a)) will enable the Government to have them all removed to one district—where the wrongful act occurred—and consolidated into one action in that district.

The third alleged difficulty, the loss of a possible right of counterclaim against the original claimant, is likewise over-emphasized by the Government. If the Government has a counterclaim against an original claimant, no substantial right of the Government will be impaired by permitting a subrogee or assignee to sue. The Government will still have its right of set-off, which may be asserted as a counterclaim (3 *Moore's Federal Practice*, 2d ed., 1948, ¶ 13.02, p. 7).

As stated in the opinion of the Court below:

> "Of course, the Government may assert a counterclaim arising out of the same transaction to the extent of plaintiff's recovery. Clark, Code Pleading (2d ed., 1947) 679-682" (R. 21).

The self-serving letter of the Comptroller General, attached to petitioner's brief as Appendix B,[4] presents no reason for distorting and stretching R. S. 3477 so as to make it apply to actions by subrogees. Indeed, it is startling to find the representatives of the largest law office in the country, aided by the representatives of the largest accounting office in the country, suggesting that citizens should be deprived of rights in order to avoid inefficiency and possible "delay and confusion" in government offices.

The remedy of the United States is not limited to 31 U. S. C. 227. In any action under the Tort Claims Act by a subrogee or by an assignee by operation of law the United States may plead and prove as an off-set any claim which the United States has against the original claimant (cf. *North Chicago Rolling Mill Co.* v. *Ore & Steel Co.*, 152 U. S. 596, 615-622; *United States* v. *Munsey Trust Co.*, 332 U. S. 234). In addition, the Government's right of off-set and counterclaim will be enhanced, because the Government, besides having the right of off-set based on what the assignor might owe, will have the further right of off-set or counterclaim against the assignee for what, if anything, the assignee might owe the Government.

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[4] This being dehors the record, it falls within the condemnation of *Schley* v. *Pullman Company*, 120 U. S. 575, 578.

The petition for certiorari states that the Government is not concerned with set-offs or counterclaims arising out of the same transaction, but only with counterclaims arising out of other transactions (Petition, p. 17). If that be so, there is no reason why the Government should not commence a separate action against the original claimant. The Government would still have available to it all the rights that are available to a private litigant.

Since the Government has the right of set-off in any action by a subrogee or assignee, and since the Government can commence a separate action against the original claimant upon any cause of action arising out of another transaction, we believe that the petitioner, in now contending that its right of counterclaim might be defeated if actions by subrogees or assignees are permitted, is putting up a straw man.

As stated in the opinion below:

> "It is argued that, if the government wants to assert an unrelated counterclaim against the employee or seek from him more than the amount recoverable by the plaintiff, allowing this action might force the government to bring a separate suit and pro tanto its right of counterclaim against the original claimant would be lost; that is to say, to give full effect to this favored situation of the government, we must override as to subrogees and involuntary assignees the direction that we must treat the United States as we would a private individual. We think, however, that the reiterated requirement that we should treat the United States like a private individual is the more fundamental, and the Congress did not intend to limit the jurisdiction of the district courts more than it is limited by the specific exceptions" (R. 20, 21).

The fourth alleged difficulty and problem, concerning the matter of possible conflicts of the various workmen's compensation statutes with the Tort Claims Act, is another straw man. We do not know whether any workmen's compensation statute (other than the New York statute) does or does not conflict in any respect with the Tort Claims Act. However, in any action brought under the Tort Claims Act, the provisions of that Act as to attorneys' fees

will prevail. There is no possibility that any provision of any workmen's compensation statute would be permitted to override a provision of the Tort Claims Act. As to attorneys' fees, the 20 percent limitation of the Tort Claims Act will control and no deduction for attorneys' fees in excess of that amount will be permitted, for it would be a violation of 28 U. S. C. 2678.

We believe, therefore, that the reasons given by the petitioner for the barring of subrogated claims have no merit.

In *United States* v. *South Carolina State Highway Dept.*, 171 F. 2d 893, 898, 899, 900, the Court of Appeals for the Fourth Circuit had the following to say about the same arguments advanced by the Government:

> "It is said that to permit suit by subrogees will result in the splitting of causes of action and in denying to the United States the right of set-off and counterclaim provided for by 28 U. S. C. A. § 1346(c); and that, for this reason, Congress could not have intended to authorize suits by or in behalf of subrogees. We see nothing whatever in this argument to justify our ignoring the plain words of the statute. So far as the right of set-off and counterclaim is concerned, the rights of the subrogee to recover cannot rise above those to whose rights he has been subrogated. United States v. Munsey Trust Co., 332 U. S. 234, 239, 240, 67 S. Ct. 1599, 91 L. Ed. 2022. And no great hardship is involved in suing in another case for recovery on a counterclaim which exceeds the claim of the subrogee. So far as the splitting of causes of action is concerned, this is a matter to be handled under the Rules of Civil Procedure relating to the consolidation of actions and the adding and dropping of parties. * * *
>
> "We think that the points raised by the defense have as little real merit as they have technical validity. The government has very properly decided to waive immunity and subject itself to suit for the wrongs committed by its agents and servants, with certain definite exceptions, just as though it were a private person or corporation. Where an insurance company has indemnified the injured person for the loss he has sustained because of the wrong, there is no reason at law or in common sense why it should not be subrogated pro tanto to the rights of the injured party, just as though the suit were against a private person."

POINT V

The current trend of legislative policy and of judicial thought is towards the abandonment of the monarchistic doctrine of governmental immunity. The enactment of the Federal Tort Claims Act is a conspicuous step forward in the progress of this trend. The attempt of the petitioner to invoke the Anti-Assignment Act as a bar in the instant case is in direct conflict with this trend. In addition to all other reasons, this justifies the Court in refusing to sustain the contention of the petitioner and in permitting the instant action to be maintained by respondent.

The doctrine that the Government is immune to claims stems originally from the ancient English aphorism that "The King can do no wrong". Such a doctrine has no place in representative government. Throughout the course of the years, Congress, conscious of the inequities and injustices resulting from the application of such a doctrine and in accord with the requirements of the citizens of our representative government, has seen fit to whittle away this immunity.

A constant succession of Acts has been promulgated by Congress towards this end:

The Court of Claims (for claims not sounding in tort).

February 24, 1855, c. 122, § 1, 10 Stat. 612.

The Tucker Act (giving the District Courts jurisdiction co-extensive with the Court of Claims of all claims not exceeding $10,000 and not sounding in tort).

March 3, 1887, c. 359, 24 Stat. 505.

Suits for Patent Infringement (making the United States liable for unlicensed use of patents).

June 25, 1910, c. 423, 36 Stat. 851.

Suits in Admiralty Act (in which the United States subjected itself to suits for damages caused by government-owned merchant ships). (First departure from immunity against torts.)

March 9, 1920, c. 95, 41 Stat. 525.

Small Claims Act (giving the administrative heads of the Government authority to adjust tort claims below $1,000).

December 28, 1922, c. 17, 42 Stat. 1066.

Public Vessels Act (in which the United States subjected itself to suits for damages caused by government-owned public vessels).

March 3, 1925, c. 428, 43 Stat. 112.

Federal Tort Claims Act.

August 2, 1946, c. 753, Title IV, 60 Stat. 843.

Thus, it is apparent that, notwithstanding any particular reasons given for the enactment of any act on any particular occasion, the ultimate fact is established that each act constituted a surrender by the Government of part of its immunity.

Judicial thought likewise has indicated that the old monarchistic principle that "The King can do no wrong" and all the derivatives therefrom have fallen into disfavor. More and more the expressed and considered opinions of this Supreme Court have reflected great reluctance to continue in the groove of this ancient English precedent.

In *United States* v. *Shaw*, 309 U. S. 495, 501, the opinion states:

"A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the im-

munity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen."

In *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 390, 391, 396, 397, referring to the claim of immunity by a governmental corporate agency, the opinion states:

"Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope. • • •

Congress has embarked upon a generous policy of consent for suits against the government sounding in tort even where there is no element of contract. • • •

Congress has thus clearly manifested an attitude which serves as a guide to the scope of liability implicit in the general authority it has conferred on governmental corporations to sue and be sued. We should be denying the recent trend of Congressional policy to relieve Regional from liability."

In *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 245, the opinion states:

"As indicated in Keifer & Keifer v. Reconstruction Finance Corp., *supra*, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned."

The opinion of the late Judge Cardozo while on the Court of Appeals of the State of New York, before his ascent to this Supreme Court, in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147, cited with approval in *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 656, states:

"The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We

are not to add to its rigor by refinement of construction where consent has been announced."

Thus the current trend of judicial thought as to the doctrine of governmental immunity is in line with the trend of the legislative policy of abandoning this ancient doctrine.

The Tort Claims Act marked a long step forward in the abandonment and surrender of the doctrine of governmental immunity. Clearly, it intended to put the Government in the position of a private citizen with respect to torts, except as to those twelve particular exceptions specified in the Act. "The words of the Act indicate a clear and sweeping waiver of immunity" (*Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 656).

The Tort Claims Act, in providing that the Government should be subject to the test of liability as if it were a private person, achieves the objective of parity between the Government and its citizens as to tort claims without any limitation or exception based upon the nature or type of claimant or claim, except as contained in the twelve exceptions mentioned in the Act. This is a drastic and far-reaching departure from the prerogatives of immunity previously asserted by Government. It is in accord with the trend of Congressional policy and judicial thought.

In line with the sweeping waiver of immunity granted by Congress in the Tort Claims Act, it is clear that Congress intended to make this Act available to insurance companies claiming as subrogees and assignees by operation of law as well as to other claimants. (*Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850.) [5]

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[5] On July 24, 1946, just 9 days prior to the enactment of the Federal Tort Claims Act, the Committee on Claims of the House of Representatives had recommended that the subrogee claimants involved in *Niagara Fire Ins. Co.* v. *United States* be paid. Subsequently, no bill was submitted to Congress for the payment of any claims of those subrogees. They were left to their remedy under the Federal Tort Claims Act (*Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 852, 853).

In the lower Court the petitioner placed primary emphasis on the argument that the Tort Claims Act should be strictly construed and that, in accord with such narrow construction, the Act should be interpreted so as to exclude claims by subrogees and assignees by operation of law, and permit claims only by the original claimants. In this Court, the petitioner has abandoned that proposition, conceding now that the terms of the Tort Claims Act are broad enough to include claims by insurance companies as subrogees and assignees by operation of law. However, to achieve indirectly the result which it failed to achieve directly in the lower courts, petitioner now urges the Anti-Assignment Act as a bar. It has been demonstrated under Points II and III, supra, that the Anti-Assignment Act was never intended to apply to a case such as the instant case and that the decisions of this Court and the history of said Act indicate that it applied to a different type of case.

Likewise, it has been clearly demonstrated that Congress manifested an intention to permit claims by insurance companies as subrogees and assignees by operation of law under the Tort Claims Act, and, furthermore, that such intent on the part of Congress is in accord with the trend of legislative policy and judicial thought.

The attempt by the petitioner to interpose the Anti-Assignment Act as a bar to the rights of the respondent under the Tort Claims Act constitutes an effort to thwart Congressional intent and policy. It conflicts with the trend of judicial thought. Rejection of the petitioner's ill-founded contention would give effect to the Congressional intent as expressed in the Tort Claims Act, in line with the recent trend of Congressional policy and judicial thought, and help to bring this country nearer to the goal of equality under the law between the Government and its citizens.

CONCLUSION

Since the difficulties evisioned by the petitioner are hypothetical and, if any of them should ever occur in any case, may be overcome by application of the available procedural remedies, R. S. 3477 should not be stretched to apply to a situation it was never intended to cover and to thwart the purpose, intent and plain meaning of the Tort Claims Act. Petitioner's indirect effort to retain part of the immunity of sovereignty waived by the Tort Claims Act should not be permitted to prevail. The monarchistic maxim that "The King can do no wrong", which gave birth to the doctrine of sovereign immunity, is repugnant to the principles of a democracy and has no place in representative government. The people of the United States proceed on the principle that the Government is their servant and not their master. Consonantly therewith, Congress made the Government liable in tort in the same manner and to the same extent as a private individual would be under like circumstances in accordance with the law of the state where the negligent injury occurred. It is indisputable and conceded that had the petitioner been such a private person or individual it would, under the laws of the State of New York, be liable to the respondent. To hold that the respondent herein, who could maintain a similar action in a New York State court had the tort feasor been a private person, may not maintain this action against the United States would frustrate the purpose of the Tort Claims Act and cause irreparable injustice to the respondent.

For all the reasons mentioned herein, it is respectfully submitted that the reversal of the judgment of the District Court by the Court of Appeals was correct and that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM A. HYMAN,
Attorney for Respondent,
Aetna Casualty and Surety Company.

WILLIAM A. HYMAN,
HAROLD W. HAYMAN,
MELVILLE HARRIS,
on the Brief.

APPENDIX

Statutes Involved

1. Sections 410(a) and 421 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat., 842, now, with immaterial amendments, in the new Judicial Code, provide:

Sec. 410(a). Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

Sec. 421. The provisions of this title shall not apply to——

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or

not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

2. The new Judicial Code, 28 U. S. C. provides:

28 U. S. 1346. *United States as defendant.*

(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U. S. C. 2678. *Attorneys' fees; penalty.*

The court rendering a judgment for the plaintiff pursuant to section 1346(b) of this title, or the head of

the federal agency or his designee making an award pursuant to section 2672 of this title, or the Attorney General making a disposition pursuant to section 2677 of this title, may, as a part of such judgment, award, or settlement, determine and allow reasonable attorney fees, which, if the recovery is $500 or more, shall not exceed 10 per centum of the amount recovered under section 2672 of this title, or 20 per centum of the amount recovered under section 1346(b) of this title, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

3. 28 U. S. C. 1402. *United States as defendant.*

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 1404. *Change of venue.*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

4. The pertinent part of R. S. 3477, 31 U. S. C. 203, provides:

31 U. S. C. 203.

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the pres-

ence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by post-masters to duly authorized agents of the lessors.

5. The pertinent parts of Section 29 of the New York Workmen's Compensation Law, as amended by L. 1947, c. 9 and 144, provide:

Section 29. *Remedies of employees; subrogation.*

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before

the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the chairman, the employer and the insurance carrier upon a form prescribed by the chairman.

2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents.

6. Federal Rules of Civil Procedure Rule 17.

(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 618

UNITED STATES OF AMERICA, PETITIONER

v.

WORLD FIRE AND MARINE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on December 2, 1948.

OPINION BELOW

The United States District Court for the District of New Mexico did not write an opinion. Its findings of fact and judgment appear in the printed record at pages 8-12. The United States Court of Appeals for the Tenth Circuit did not write an opinion in this case, but affirmed on the authority of its opinion in *United States of America* v. *Chi-*

cago, Rock Island and Pacific Railway Company, reported at 171 F. 2d 377 [1] (R. 22).

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1948 (R. 22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition of R.S. 3477 (31 U.S.C. 203) against the assignment of claims against the United States, may be invoked by the United States to bar recovery of a judgment against it under the Federal Tort Claims Act by an insurance company which sues in its own name as partial subrogee on the basis of partial indemnification to the owner of property damaged by an employee of the United States.

STATUTES INVOLVED

Sections 1346 (b), 1346 (e), 1402 (b), and 2674 of Title 28, United States Code,[2] and the pertinent

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[1] The United States is petitioning for certiorari in that case also, *sub nom. United States of America, Petitioner* v. *Joseph B. Fleming and Aaron Colnon, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a Corporation.*

[2] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U. S. C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied in the Federal Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under

provisions of R.S. 3477 as amended, 31 U.S.C. 203, are set forth in the Appendix, *infra*, pp. 16-19.

STATEMENT

A truck owned by Donald E. Harding collided on January 2, 1947, near Aragon, New Mexico, with a truck owned by the United States (R. 9). The accident was allegedly due to the negligence of the Government employee who was driving the latter vehicle (R. 1). The loss to Harding resulting from this collision amounted to $884.50, the cost of necessary repairs, and $600.00, the cost of renting a replacement truck while his own was being repaired, a total of $1,484.50 (R. 9). Respondent World Fire and Marine Insurance Company, a Connecticut corporation, under the terms of a collision insurance policy which it had issued to Harding, paid him $784.50, the cost of the repairs less a deduction of $100 provided for in the policy (R. 9-10).

Respondent World Fire and Marine Insurance Company, joining Harding as a plaintiff, brought an action against the United States under the Federal Tort Claims Act in the United States District Court for the District of New Mexico, to recover $784.50, the amount it had paid under its policy,

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the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.) The citations in this petition are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act.

together with the costs of the action, while Harding sought judgment for $700.00, the amount of his loss not covered by insurance (R. 1-3). The Government moved to dismiss respondent's complaint on the ground, *inter alia*, that the transfer to respondent of an interest in Harding's claim was null and void under R. S. 3477, 31 U. S. C. 203 (R. 3). This motion was denied (R. 5). The Government then filed an answer, and after a trial on the merits the district court found the facts as stated above and entered judgment in favor of respondent for $784.50, and in favor of Harding for $700.00 (R. 5-6, 8-12).[3]

The United States took an appeal on the points of law raised by its motion as to the right of respondent to recover (R. 12, 13). The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the district court without opinion, on the authority of its holding in *United States of America* v. *Chicago, Rock Island and Pacific Railway Company*, 171 F. 2d 377, that a "subrogee or indemnitee" may maintain an action against the United States under the Federal Tort Claims Act (R. 22).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a partial subrogee was entitled to recover judgment against the United States under the Federal Tort Claims Act.

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[3] Costs, in the amount of $43.64, were awarded to respondent (R. 11).

2. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

This is the second of a group of five cases in which the United States is seeking a determination as to certain of its basic rights as a party defendant under the Federal Tort Claims Act. The basic question in all of these cases is whether Congress intended by that Act to repeal R. S. 3477 by implication and to authorize anyone other than the person originally sustaining the loss or injury to recover judgment against the United States. In three cases of the group, this case and the two following Nos. 619 and 620, that question arises because the action was brought by an insurance company which, under the terms of its policy, had partially indemnified the original claimant for his loss, and which therefore claimed ownership by subrogation of a fractional part of the claim against the Government, with the right to maintain an action thereon in its own name. The present case is an action by an insurance company subrogee, with the original claimant joined as a plaintiff, each seeking to recover his respective portion of the claim. The next logical step, if such an action is proper, is illustrated in the two cases following, *United States of America* v. *Yorkshire Insurance Company* and *United States of America* v. *The Home Insurance Company*, Nos. 619 and 620, which were independent actions by two insurance companies, each asserting the right by subrogation to recover on a portion of the same claim.

As we have pointed out in the petition for certiorari in No. 617, *United States of America* v. *Aetna Casualty & Surety Company*, there is no necessity for depriving the Government of the protection of R. S. 3477. A recovery in the name of the original claimant will require the Government to discharge its full liability, certainly sufficient to meet the purposes of the Act. On the other hand, it is of great importance to the United States to be free to invoke R. S. 3477, 31 U. S. C. 203, as actions by derivative claimants will subject the Government to the possibility of multiple suits resulting from the splitting of causes of action, will permit venue in a district other than that in which the original claimant could have brought the action, and will defeat the Government's right of counterclaim against the original claimant. These evils are particularly apparent in such cases as the present case and in Nos. 619 and 620, as these insurance companies do not claim all, but only a part of the entire cause of action. This subdivision of a single claim increases the number of persons with whom the Government must deal, subjects the Government to the danger of becoming embroiled in conflicting claims, impedes the settlement of such claims by compromise, and deprives the Government of the certainty of a full acquittance in the discharge of its liabilities. For more than a century, Congress has protected the Government from all such contingencies and has safeguarded its in-

terests as a debtor and as a litigant by the provision, now embodied in R. S. 3477, that any transfer or assignment of a claim against the United States shall be null and void unless made after the allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof. This statute and decisions of this Court construing it with fair regard for its purpose and the Government's interest compel a conclusion contrary to that reached by the court below.

1. Since the court below did not write an opinion in this case, and since its opinion in *United States of America* v. *Chicago, Rock Island and Pacific Railway Company*, 171 F. 2d 377, on the basis of which this case was decided, does not discuss the applicability of R. S. 3477 to respondent's claim as partial subrogee, there is no direct expression in the record as to the court's reason for declining to hold that R. S. 3477 barred the enforcement of the claim against the United States. Presumably, however, it adopted the ground on which respondent opposed the Government's motion to dismiss—that the transfer to it of an interest in Harding's claim was involuntary, resulting from operation of law, and hence was not barred by R. S. 3477 (R. 4).

R. S. 3477 provides that all transfers and assignments of any claim upon the United States or any interest therein, and for whatever consideration, shall be absolutely null and void unless executed in the presence of at least two witnesses, after the

allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for payment. This Court in *Goodman* v. *Niblack,* 102 U. S. 556, 560, although holding the particular assignment there involved to be beyond the purview of the statute, specifically recognized that the statutory language "is broad enough * * * to include transfers by operation of law * * *," and has on several occasions observed that no language could be broader or more emphatic than these provisions, which embrace all transfers, whether by operation of law or otherwise. *United States* v. *Gillis,* 95 U. S. 407, 413; *Spofford* v. *Kirk,* 97 U. S. 484, 488. This Court has found that R. S. 3477 was "* * * * * passed for the protection of the government * * *", *Hobbs* v. *McLean,* 117 U. S. 567, 576, and evidences the intention of Congress to protect the Government from the "* * * danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Co.,* 300 U. S. 588, 594. Recognizing that the accomplishment of the purpose intended by Congress did not require the literal application of the provisions of the statute, this Court has excepted from its bar the instances where all the claimant's property has been transferred by operation of law to a universal successor, as by descent or bankruptcy, see *Erwin* v. *United States,* 97 U. S. 392, 397, insolvency, *Butler* v. *Goreley,* 146 U. S. 303, 311, assignment for the

benefit of creditors, the equivalent of bankruptcy, *Goodman* v. *Niblack,* 102 U. S. 556, 560-561, or consolidation in corporate reorganization, *Seaboard Air Line Ry.* v. *United States,* 256 U. S. 655, 657. In such cases it is obvious that the interests of the Government are not endangered by the transfer, as the Government deals with the substituted representative just as it would have dealt with the original claimant.

Here there was no transfer of all the claimant's property to a universal successor, or even of all of a single claim. On the contrary, respondent is asserting ownership of only *a portion* of a claim, with the right to maintain an action thereon in its own name against the United States. No decision of this Court has ever countenanced such a subdivision of a contested claim.[4] Cf. *Houston* v. *Ormes,* 252 U. S. 469, 474, which permitted the enforcement of an attorney's lien against a claim already allowed, where the duty to pay was merely ministerial, with *Nutt* v. *Knut,* 200 U. S. 12, 20-21, holding invalid a contract making the payment

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[4] Congress emphasized its opposition to the partial transfer of claims in amending R. S. 3477 to permit small contractors to assign moneys due or to become due under Government contracts so as to help them obtain financial backing in carrying out national defense contracts. While it thus relaxed the rigid limitations of the statute, Congress expressly provided that any such assignment should cover all amounts payable and not already paid, should not be made to more than one party, and should not be subject to further assignment. Act of October 9, 1940, c. 779, sec. 1, 54 Stat. 1029, amending R. S. 3477, 31 U. S. C. 203; see *Coconut Grove Exchange Bank* v. *New Amsterdam Cas. Co.,* 149 F. 2d 73, 77 (C. A. 5).

of the attorney's compensation a lien upon the claim prior to its allowance. We submit that the decision of the court below does not measure up to the requirement laid down by this Court, that R. S. 3477 "* * * must be interpreted in the light of its purpose to give protection to the Government." *Martin* v. *National Surety Co.*, 300 U. S. 588, at 596.

2. The only other possible ground on which this action by respondent could be sustained is that the Federal Tort Claims Act effected an implied repeal of R. S. 3477. Since no compelling considerations exist which require that the Act be construed as permitting the transfer of claims against the United States, it should be given a construction consistent with R. S. 3477, in view of the familiar rule that implied repeals are looked upon with disfavor. *General Motors Corp.* v. *United States*, 286 U. S. 49, 61-62; *United States* v. *Jackson*, 302 U. S. 628, 631; *United States* v. *Borden Corp.*, 308 U. S. 188; *U. S. Alkali Assn.* v. *United States*, 325 U. S. 196, 209. There are, moreover, affirmative considerations which demonstrate beyond question that Congress never intended to change the law regarding the assignability of claims against the United States. Underlying R. S. 3477 is a broad Congressional policy to provide for the orderly and convenient determination of the Government's liabilities and to protect the Government's interests in discharging them. The

holding of the court below subjects the Government in a substantial degree to the "danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability," against which, as this Court said in *Martin* v. *National Surety Co.*, 300 U. S. 588, 594, it should be protected.

(a) Multiple suits with different venue on the same claim are a very real possibility stemming from the ruling below. The fact that in this particular case the subrogee joined his subrogor as a plaintiff is no more than a fortuitous circumstance, as there is nothing in the rulings of either court below which would prevent the partial subrogee from bringing his action independently in a district where his subrogor, the original claimant, could not be required to join. An example of the harmful consequences of the ruling below to the Government is the litigation which has grown out of two accidents involving Government aircraft and aircraft owned by Eastern Air Lines, Inc. One of these accidents occurred near Florence, South Carolina. The Glen Falls Indemnity Company, which was insurer for Eastern, paid Eastern $90,500 for the loss of its airplane and then brought an action in its own name under the Federal Tort Claims Act in the Southern District of Florida. This action was dismissed on the ground that plaintiff was a New York corporation and hence not a resident of the district in which the action was brought.

Thereafter, the Glen Falls Indemnity Company brought a new action, Civil No. 3021 in the Northern District of New York. Meanwhile, Eastern Air Lines, Inc., being a Delaware corporation, had brought an independent action against the United States in the District of Delaware, Civil No. 1055. The United States has a counterclaim against Eastern for $193,557.56 based on the same accident, and is asserting that counterclaim in the Delaware action. The other accident, which occurred at Nashville, Tennessee, is the basis for similar litigation, except that there the Government is not asserting a counterclaim. Thus, in each instance, a single accident is currently the subject of two suits, one brought by the original claimant in the district of its residence, the other brought by an insurance company subrogee in the district of its residence.[5]

Another example of the vexatious litigation made possible by the holding below is an action brought by the Old Colony Insurance Company. Old Colony, having indemnified a policy holder for all but $50.00 of the damage sustained when an Army truck ran into his automobile, brought an

[5] The ruling below, that a single cause of action may be split and separately prosecuted, permits venue to be laid as to each portion of the cause of action in different districts. Actions under the Federal Tort Claims Act "may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U. S. C. 1402 (b). Presumably, under the venue provision of revised Title 28, an insurance company subrogee could prosecute its portion of a cause of action against the United States under the Federal Tort Claims Act in any district where it was doing business. 28 U. S. C. 1391 (c).

action against the United States under the Federal Tort Claims Act to recover the amount it had paid out. The district court dismissed the action on the ground that the Act did not authorize the maintenance of an action by a subrogee. On appeal the United States Court of Appeals for the Sixth Circuit reversed, holding that as a subrogee Old Colony was a "claimant" within the meaning of the Act, and that it was also the real party in interest under Rule 17 of the Federal Rules of Civil Procedure. *Old Colony Ins. Co.* v. *United States*, 168 F. 2d 931, 933, 934 (C. A. 6). Meanwhile the original claimant had applied to the Department of the Army for an administrative adjustment of his claim under 28 U. S. C. 2672, which authorizes the administrative settlement of claims under $1,000.00. The attorneys handling the case for the Government were never advised of this fact, as the Department of the Army failed to discover that a claim which was the subject of an application for administrative adjustment by one claimant was also the subject of an action brought in the name of an entirely different claimant. Government counsel received their first information regarding this application immediately before the argument of the case in the Court of Appeals, when counsel for the Old Colony Insurance Company advised that he had a check which had been issued to the original claimant by the Department of the Army for the full amount of his loss, and Government counsel proceeded with the argument of the

case on the understanding that the check would be returned. The check was not returned, however, but was retained and cashed after the Court of Appeals had rendered its decision upholding the right of the partial subrogee to sue and recover under the Tort Claims Act. The cashing of the check prevented the Government from seeking a review of that decision by this Court on certiorari, as the payment of the claim rendered the case moot.

We refer to these cases solely for the purpose of demonstrating that the considerations which we urge are not hypothetical, but instead represent the practical problems already encountered in the defense of actions under the Federal Tort Claims Act. True, the claim here involved is not the subject of multiple actions. However, the principle established by the decision below—that a partial subrogee may prosecute his portion of a claim to judgment in his own name—makes such multiple actions possible. Unquestionably R. S. 3477 evidences the intention of Congress to assure the Government of a single and complete discharge of its obligations to those having claims against it. We submit that Congress did not intend to deprive the Government of that certainty in dealing with claimants under the Federal Tort Claims Act.

(b) In holding that a partial subrogee has an absolute right to recover judgment in his own name against the United States, the court below has in-

creased the number of persons with whom the Government must deal in the determination and discharge of its liabilities, a result clearly in conflict with the policy of R. S. 3477 as recognized by this Court. Under this decision, the Government is not free to deal solely with the original claimant in negotiations looking to a settlement of the claim and may not rely upon a release executed by the original claimant alone. Unless the original claimant's insurer also joins in the release, the Government may be subjected to a later suit. 7 Cooley on Insurance (2d ed., 1928), p. 6712; 8 Couch on Insurance, sec. 2001, pp. 6601-6602. Thus the Government will not only be embarrassed in its settlement negotiations, particularly where it has a set-off or counterclaim against the original claimant, but may also become embroiled in conflicting claims between the original claimant and his insurer. Moreover, decentralized administrative settlement of claims by the various departments and agencies becomes impossible. Obviously Congress did not intend any such result in passing the Federal Tort Claims Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1949.

APPENDIX

STATUTES INVOLVED

1. Sections 1346 (b), 1346 (c), 1402 (b), and 2674 of Title 28, United States Code, as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess. [the provisions of the above sections having been formerly embraced in Sections 410 (a) and 411 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843-844, as amended by the Act of August 1, 1947, c. 446, Section 1, 61 Stat. 722, 28 U.S.C. 931 (a) and 932] provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 173[6] of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in ac-

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[6] Apparently should read "171," since that is the number of the chapter on Tort Claims Procedure.

cordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

* * * * *

28 U. S. C. 1402. *United States as defendant.*

* * * * *

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries re-

sulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

2. R. S. 3477, as amended, 31 U. S. C. 203, provides in pertinent part:

31 U. S. C. 203.

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not

apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 36

UNITED STATES OF AMERICA, PETITIONER

v.

WORLD FIRE AND MARINE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The United States District Court for the District of New Mexico did not write an opinion. Its findings of fact and judgment appear in the printed record at pages 7–10. The United States Court of Appeals for the Tenth Circuit *did not* write an opinion in this case, but affirmed on the authority of its opinion in the *United States of America* v. *Chicago, Rock Island and Pacific Railway Company,* reported at 171 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1948 (R. 17). The petition for certiorari was filed March 2, 1949, and

was granted April 25, 1949 (R. 18). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the prohibition by R. S. 3477 (31 U. S. C. 203) of the assignment of claims against the United States, may be invoked by the Government to bar recovery of a judgment against it under the Tort Claims Act by an insurance carrier claiming by subrogation the right to prosecute to judgment in its own name a portion of the claim of the insured original claimant against the United States.

STATUTES INVOLVED

The statutes and rules involved are set forth in Appendix A to the Government's brief in *United States* v. *Aetna Casualty and Surety Company*, No. 35, this Term, and will not be reprinted here.

STATEMENT

A truck owned by Donald E. Harding collided on January 2, 1947, near Aragon, New Mexico, with a truck owned by the United States (R. 7). The accident was due to the negligence of the Government employee who was driving the latter vehicle (R. 7). The loss to Harding resulting from this collision amounted to $884.50, the cost of necessary repairs, and $600.00, the cost of renting a replacement truck while his own was being repaired, a total of $1,484.50 (R. 8). Respondent World Fire and Marine Insurance Company, a

Connecticut corporation, under the terms of a collision insurance policy which it had issued to Harding, paid him $784.50, the cost of the repairs less a deduction of $100 provided for in the policy (R. 8).

Respondent World Fire and Marine Insurance Company, joining Harding as a plaintiff, brought an action against the United States under the Federal Tort Claims Act in the United States District Court for the District of New Mexico, to recover $784.50, the amount it had paid under its policy, together with the costs of the action, while Harding sought judgment for $700.00, the amount of his loss not covered by insurance (R. 1–2). Both by motion to dismiss (R. 3) and by answer (R. 5) the Government urged that the prohibition by R. S. 3477, 31 U. S. C. 203, of the assignment of claims against the United States precluded respondent from suing and recovering judgment in its own name. After a trial on the merits the district court found the facts as stated above and entered judgment in favor of respondent for $784.50, together with costs of $43.64, and in favor of Harding for $700.00 (R. 7–10).

The United States took an appeal on the points of law raised by its motion and answer as to the right of respondent to recover judgment in its own name (R. 10). The United States Court of Appeals for the Tenth Circuit affirmed without opinion, on the authority of its holding

in *United States of America* v. *Chicago, Rock Island and Pacific Railway Company*, 171 F. 2d 377, that a "subrogee or indemnitee" may maintain an action against the United States under the Federal Tort Claims Act (R. 17).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that respondent, a partial subrogee, was entitled to recover a separate judgment in its own name against the United States under the Federal Tort Claims Act.

2. In affirming the judgment of the district court.

ARGUMENT

The respondent insurance carrier joined with the original claimant in bringing suit and sought judgment in its own name against the United States under the Tort Claims Act. It predicated its right to recover judgment in its own name upon the theory that by reason of its partial payment, pursuant to the policy, of the original claimant's loss it was subrogated to part of the insured original claimant's unliquidated tort claim against the United States (R. 2). Respondent also obtained from the original claimant an express written assignment of his claim in consideration of payment (R. 15–16).

Such a written assignment by the original claimant of his claim against the United States was

obviously prohibited by R. S. 3477, so as to preclude respondent from bringing suit in its own name. To the extent that respondent relied upon the alternate theory of an equitable assignment by subrogation, arising from the fact of payment to the original claimant, its assured, the Government contends that R. S. 3477 equally precludes respondent from recovering separately under the Tort Claims Act in its own name.

The reasons and authorities establishing the correctness of the Government's view are set forth in detail in our briefs in the companion cases of *United States* v. *Aetna Casualty and Surety Company,* No. 35, this Term, and *United States* v. *Yorkshire Insurance Company* and *The Home Insurance Company,* Nos. 37 and 38, this Term, and need no repetition here. Specifically, we believe that R. S. 3477 required the entry of judgment in favor of the original claimant, Donald E. Harding, alone, rather than for the original claimant and for respondent separately for the amounts of their respective interests. So far as concerns the rights of respondent against its assured, the original claimant, they may be fully protected by a declaration in the judgment that the original claimant shall pay respondent, out of the net proceeds of his judgment against the United States, the amounts to which respondent is entitled. *United States* v. *Hill,* 174 F. 2d 61, modifying 171 F. 2d 404 (C. A. 5).

CONCLUSION

For the reasons set forth in our briefs in Nos. 35, 37 and 38, this Term, it is respectfully submitted that the decision of the court below should be reversed and the cause remanded, with instructions to the district court to modify the judgment previously rendered by entering judgment in favor of the original claimant, Donald Harding, upon the entire cause of action.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

LEAVENWORTH COLBY,
SAMUEL D. SLADE,
JOSEPH KOVNER,
Attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 618

UNITED STATES OF AMERICA, *Petitioner*

v.

WORLD FIRE AND MARINE INSURANCE COMPANY

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The respondent has no objection to petitioner's statement of the opinion below, the jurisdiction, the question presented, the statutes involved, nor to the statement.

PRELIMINARY ANALYSIS

The petitioner has advanced the following arguments in support of the writ:

1. That the Assignment of Claims Act, R.S. 3477, 31 USC 203[1], bars a subrogee from asserting a claim against the Government, where the claim asserted is only a portion of the original claim of the subrogor.

2. That Congress did not intend by the passage of the Federal Tort Claims Act, 28 US 931 et seq[2], to impliedly repeal the Assignment of Claims Act, as shown by

[1]Hereinafter referred to as the "Assignment of Claims Act."

[2]Hereinafter referred to as the "Federal Tort Claims Act" and cited with reference to its original codification in 28 USC 921 et seq.

(a) The possibility of multiple suits with different venue on a claim if a partial subrogee may maintain an action against the Government.

(b) Defeat of the Government's right of counterclaim against the subrogor or original claimant if a partial subrogee may maintain an action against the Government.

(c) The possibility of the increase in the number of persons with whom the Government must deal in order to discharge its tort liability if a partial subrogee may maintain an action against the Government.

We shall argue:

1. That the Assignment of Claims Act does not bar an action by a partial subrogee against the Government.

2. That even if the Assignment of Claims Act bars an action by a partial subrogee, said act is impliedly repealed by the Federal Tort Claims Act.

BRIEF IN OPPOSITION

The petitioner does not contend that the claim of the respondent arises in a manner other than by operation of law. It contends, in spite of its admission that there is an exception for claims arising by operation of law which this Court has carved out the Assignment of Claims Act (Petition pp. 8, 9), that this exception should not be made and the claim should be barred by the act where the claimant is asserting only a portion of the original claim, as in the instant case. One circuit court has sustained this contention[1], and it has been repudiated by seven other circuit

[1]See opinion of Sibley, J in *United States of America v. Hill et al* 171 F(2) 404, 405, (C.A. 5) McCord, J, concurring, and dissenting opinion by Hutcheson, J.

courts[2]. In support of this contention the petitioner speculates as to certain procedural problems which may arise if the present action may be maintained, and urges these problems as a basis for a Congressional intent *not* to impliedly repeal the Assignment of Claims Act by the passage of the Federal Tort Claims Act. This argument is not to be answered by a statement that the great majority of the circuits found it without merit. The answer to petitioner's argument is to be found in these elements: legislative history and the language of the Federal Tort Claims Act, the treatment of partial subrogees under other acts waiving sovereign immunity, and the practical results if a partial subrogee is not allowed to assert a claim.

In discussing these elements we will assume for the purpose of argument that *but for* the Federal Tort Claims Act, the Assignment of Claims Act bars a subrogee from asserting a portion of the original claim against the Government even though the partial claim arises by operation of law, as in the instant case. In other words, if the present action may be maintained, the Assignment of Claims Act is impliedly repealed insofar as it bars the claim of a partial subrogee. At the outset of our discussion, however, we should like to comment on the petitioner's statement that "no decision of this Court has ever countenanced such a subdivision of a contested claim". (Petition p. 9.) It should be pointed out that this Court has never passed upon the question of whether the Assignment of Claims Act

[2] *State Farm Mutual Liability Insurance Co. v. United States of America* (C.A. 1) Civil No. 4371, February 1, 1949; *Aetna Casualty and Surety Co. v. United States of America* 170 F(2) 469 (C.A. 2); *Yorkshire Insurance Co. and The Home Insurance Co. v. United States of America* 171 F(2) 374 (C.A. 3); *United States of America v. South Carolina Highway Department et al* 171 F(2) 893 (C.A. 4); *Old Colony Insurance Co. v. United States of America* 168 F(2) 931 (C.A. 6); *Employers Fire Insurance Co. v. United States of America* 167 F(2) 655 (C.A. 9); *United States of America v. Donald Harding et al* 171 F(2) 550 (C.A. 10); *United States of America v. Chicago, Rock Island & Pac. Ry. Co.* 171 F(2) 377 (C.A. 10).

bars a partial assignee of a claim which devolves on the claimant by operation of law. This Court has uniformly held, however, that the Assignment of Claims Act does not bar a claim which arises by operation of law. *Erwin v. United States* 97 U.S. 392, 397; *Goodman v. Niblack* 102 U.S. 556, 560-561; *Butler v. Gorely* 146 U.S. 303, 311; *Seaboard Air Line Ry. v. United States* 256 U.S. 655, 657. See: *United States v. American Tobacco Co.* 166 U.S. 468, 474.

1. Legislative History of the Federal Tort Claims Act.

The most thorough treatment of the background and history of this act is found in the opinion by Judge Medina in *Niagara Fire Insurance Co. v. United States.* 76 F Supp 850 (S.D.N.Y.). After his development of the background leading up to the act, Judge Medina concludes that all factors point to the intent of Congress to relieve itself of the burden of handling *all* of the ever increasing tort claims against the government, be they made by an original claimant or by a partial subrogee. Perhaps the most striking factor upon which his conclusion is based is seen in the facts of the very case he decided. In the Niagara case, the plaintiffs, all of whom were subrogees, had applied to Congress for private relief legislation, as was the common practice before the Federal Tort Claims Act.[1] A bill was introduced in 79th Congress embodying the relief, was then submitted to the Committee on Claims and after an exhaustive investigation was reported out favorably on July 24, 1946, which was just nine days prior to the enactment of the act. Since the Legislative Reorganization Act, 60 Stat. at Large 812, Sect. 131, provided that no private bill could be passed for payment of a claim for which suit could be brought under the Federal Tort Claims Act, no action was taken by Congress on the favorably reported bill, nor was it reintroduced in the 80th Congress. Does

[1] See below, p. 6, n. 1.

not this failure to act show a clear Congressional intention that partial subrogees could sue the Government in tort?

The Report of the Joint Committees on The Reorganization of Congress to Accompany S. 2177 (Sen. Rep. No. 1400, 79th Cong., 2d Sess. 1946), of which the Federal Tort Claims Act is a part, likewise throws light on the Congressional intent. It is there stated:

> "Congress is overburdened by many local and private matters which divert its attention from national policy making and which it ought not to have to consider. It functions as a common counsel for the District of Columbia. It serves as a tribunal for the settlement of private claims. It spends much time on pension bills .... Title IV (of S. 2177) provides for the administrative and judicial adjustment of tort claims against the United States which Congress is poorly equipped to settle." (p.7).
>
> "For the information of the Senate the following statement .... covering the history of this legislation and a summary of existing law is incorporated and made a part of this report:
>
> " 'History of Legislation
>
> " '***For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery *as a matter of right* but bases any award that may be made *on considerations of grace.* Moreover, it does not afford a well-defined continually operating machinery for the consideration of such claims ....' " (emphasis ours)
>
> " 'As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be

> maintained against the Government in respect to any common-law tort. The existing exemption in respect to common-law torts appears incongrous. Its only justification seems to be historical. With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles'." (pp. 30-31).

And so we see that the primary purpose of this act was to relieve Congress of the burden of handling a multitudinous number of claims by the passage of private legislation, and to afford the claimants the machinery of the federal courts so that recovery could be had "as a matter of right" rather than based "on considerations of grace". Did Congress intend to reserve for itself the continued handling of claims of partial subrogees, as contended by the petitioner? Its failure to act on the claims of the subrogees who later became the plaintiffs in the Niagara case is its answer. Many of the claims presented to Congress before the passage of the Federal Tort Claims Act were doubtless made by insurance companies who were subrogated to the rights of their insureds and Congress was therefore well aware of the claims of subrogees at the time of its passage.[1] "Bills to reimburse insurance companies for losses sustained as a result of torts of federal employees have just as much merit and cause just as much trouble to Congress as bills to reimburse the party originally injured." *United States of America v. The South Carolina Highway Department* 171 F(2) 893, 898 (C.A. 4).

[1]For examples of legislation passed for the benefit of subrogees before the Federal Tort Claims Act see: Private Law 529, 77th Cong., chap. 663, 2nd. Sess. (H.R.5651) approved Dec. 2, 1942; Private Law 276, 77th Cong., chap. 82, 2nd Sess. (H.R. 3118) approved Feb. 16, 1942; Private Law 430, 78th Cong., chap. 510, 2nd. Sess. (S 1278), approved Dec. 6, 1944; Private Law 266, 77th Cong., reported in U. S. Stat. at Large, Vol. 54, part 2, p. 1242 (H.R. 3363); Public Law 142, 77th Cong., chap. 341, 1st Sess. (H.R. 3523) approved July 30, 1941.

2. Language of the Federal Tort Claims Act.

We quote the critical language, which is found in 28 USC 931 (a): "Subject to the provisions of this chapter, the United States district courts . . . shall have exclusive jurisdiction to hear, determine and render judgment on *any* claim against the United States . . . under circumstances where the United States, *if a private person* would be liable to the claimant." (emphasis ours) No distinction is made as to the type of claim which may be made, be it asserted by a partial subrogee or otherwise. Judgment may be rendered on "any" claim. This broad and sweeping language drops completely the shield sovereign immunity of the United States for liability in tort and the Government is placed upon an exact parity with a private litigant. Are not these procedural problems which the petitioner urges as a basis for a bar to the instant action the same problems with which a "private person" would be faced?

As a further expression of Congressional intent to allow a partial subrogee to assert a claim, we respectfully direct the Court's attention to Section 943 of the Federal Tort Claims Act. In this section Congress has designated twelve categories of claims which cannot be made. Claims made by subrogees are *not* among those there designated. Of what import is this? As shown in Section 931 (a), Congress employed sweeping and broad language to waive sovereign immunity. Any tort claim arising out of negligence may be made against the Government if it could be made against a private party. Following the broad language of this section is placed a section which lists twelve types of claims which may not be made. The time honored doctrine of statutory construction, *expressio unius est exclusio alteruis*, forces even the tyro to this irresistable conclusion: if Congress had intended to exclude the claims of partial subrogees, it

would have placed such claims in the section expressly given to exclusions. The logic is inescapable that the failure to designate claims of subrogees among the exclusions is "positive evidence that none was intended". See *Insurance Company of North America v. United States* 76 F. Supp. 951, 953 (E.D. Va.). The syllabus of the Court in *Wabash R.R. Co. v. United States* 178 F. 5, 6 (C.A. 8) seems peculiarly apt to substantiate our position:

> "When a legislative body has made a grant or given a permission with a specific exception or limitation and has made no other exceptions or limitations, a conclusive presumption arises that it intended to make none, and it is not the province of the courts to do so."

The petitioner asks: Why then, if Congress intended by the Federal Tort Claims Act to allow claims by partial subrogees, did it not specifically say so? The act itself answers this question by its unqualified waiver of sovereign immunity followed by the exceptions thereto. Failure to make specific mention of subrogees was not mere inadvertence. As pointed out above,[1] Congress was fully aware of subrogated claims because much of the private relief legislation had been for the benefit of subrogees. In fact, the attention of the House Committee was specifically directed to this point by the Assistant Attorney General. See opinion of Orr, J. in *Employer's Fire Insurance Company, et al. v. United States*, 167 F.(2) 655, 657 (C.A. 9). Furthermore, the act was not the product of eleventh hour draftsmanship. It was carefully, deliberately and skillfully written by draftsmen who were acutely aware of the existing Congressional burden of handling claims by subrogees. See *Niagara Fire Ins. Co. v. United States*, 76 F. Supp 850, 854 (S.D. N.Y.); Gellhorn and Schenck, Tort Claims Actions against the Federal Government, 47 Col. L. R. 722, 726,

[1] See supra p. 6, n. 1.

(1947); The Federal Tort Claims Act, 56 Yale L. J. 534, 535, and note 10 (1947); Armstrong and Cochrill, The Federal Tort Claims Bill, 9 Law and Contemp. Prob. 327, 328, and notes 1 and 6 (1942). The very nature of legislative draftsmanship required the draftsmen to draw the act in this manner. They adopted the only technique which could effectively lend itself to a practical administration of the act by the courts: An unqualified waiver of the sovereign immunity followed by a designation of the cases in which there was no waiver. It should be apparent even to an amateur draftsman the impossibility of designating *all* types of tort claims the act was intended to cover rather than broadly stating it covered all claims and then making exceptions. If the former method were used, would it not be inevitable that many types of claims would be inadvertently omitted which the act was meant to include?

3. Treatment of Partial Subrogees Under Other Acts Waiving Sovereign Immunity.

It has been uniformly held that partial subrogees may maintain an action against the Government under the Suits in Admiralty Act. 46 USC 741 et seq. *U. S. Fidelity & Guaranty Co. v. United States of America* 56 F Supp. 452 (S.D. N.Y.), aff'd in 152 F (2) 46 (C.A. 2); *Phoenix Insurance Co. v. United States of America* 3 F Supp. 112 (D.C. Conn.). Actions by subrogees have also been allowed under the Tucker Act 28 USC 250(1). *United States of America v. American Tobacco Co.* 166 US 468. As in the Federal Tort Claims Act, neither act contains a provision allowing suits by subrogees. Brief mention should also be made of the Foreign Claims Act, 31 USC 224 (d). This act authorizes the Secretaries of War and Navy to appoint a claims commission to dispose of claims caused by the United States Armed Forces in foreign countries. The act

expressly provided coverage for "claims of insureds but excluding claims of subrogees". This act is a graphic illustration of the manner in which Congress expresses its intent to exclude claims of partial subrogees from a waiver of soverign immunity: *it excludes them specifically.* See also 36 Ops Attn'y Gen'l 553 (1932) and 19 Comp Gen'l 503 (1939) in connection with the rights of subrogees to sue the Government under the Small Tort Claims Act, 31 USC 215, and Emergency Relief Appropriations Act, 56 Stat. 936.

4. The Practical Results if a Partial Subrogee is Not Allowed to Bring an Action Under the Federal Tort Claims Act.

Judge Bryan in *Insurance Company of North America* 76 F. Supp 951, 953 (E.D. Va.) suggests two methods by which partial subrogees could legitimately recover if they are not allowed the benefit of the act. The first method is "by the insurer's stipulation that the insured sue the United States as a prerequisite to recovery against the insurer." This would seem to unduly penalize one who was forehanded enough to carry insurance and defeat the very purpose of insurance coverage. The second suggested method is "by resorting to the method followed in *Luckenback v. W. J. McCahan* 248 US 139, 39 S. Ct. 53, 63 L Ed 170, I ALR 1522 and in *The Plow City,* (3 Cir.) 122 F(2) 816, certiorari denied 315 US 798, 62 S. Ct. 579, 86 L Ed 1199, of making the payment by the insurance company a loan to the insured and thereafter bringing an action against the United States in the name of the insured."

Another result will be that Congress must again shoulder the burden of handling the numerous claims of partial subrogees and pass relief legislation for their benefit. If the petitioner's position is correct this task is once more

dumped into the lap of Congress. As was pointed out in the Committee Report submitted with the Federal Tort Claims Act (quoted supra pages 5 and 6), the purpose of the act was to shift this burden to the courts so that recovery could be had "as a matter of right" rather than "on considerations of grace". Our prognostication is that if this purpose is thwarted, Congress will again attempt to carry out its intent by the passage of a separate bill for the specific benefit of subrogees.

Finally, if a partial subrogee is not entitled to sue under the Federal Tort Claims Act, the result will be that the Government's liability for the torts of its employees will be directly dependent upon the fortuitous circumstance of whether or not the party originally damaged carries insurance. If he does carry insurance, then the Government, the party in the wrong, will be enriched in the amount an innocent party pays for its wrong. Is it suggested that the insurance companies are not hurt by a denial of their claims because their premiums rates are scaled upon losses paid. That is true. But the ones who are hurt are those who carry insurance. It is common knowledge that the amount of subrogation recoveries proportionately decreases the premium rate. Consequently, the denial of such recoveries increases the amount of the premium. See notes in 61 HLR 1076, 1077; Va. L. R. August 1948, page 721. Obviously, then, the exclusion of partial subrogees from the benefit of the Federal Tort Claims Act, as contended by petitioner, results in a financial detriment to those who follow the sound business practice of carrying insurance to protect themselves from loss. Judge Parker in *United States of America v. The South Carolina State Highway Department* 171 F(2) 893, 900 (C.A. 4) states our position in terse fashion:

> "It is inconceivable that the fact that the injured party has insurance should affect his right to recover in tort against the government, or that recovery for property damage should not go to the insurer to the extent that he has reimbursed the injured party rather than to the latter. Certainly it could not have been intended either that a recovery for a loss be denied because the injured party has been prudent enough to insure against it or that recovery be allowed where the insurer has paid the loss, except for his reimbursement."

Thus we have presented what we submit are four compelling reasons showing a clear Congressional intent to allow a partial subrogee to assert a claim against the Government under the Federal Tort Claims Act. In this presentation, as pointed out above, we have admitted for the purpose of argument that there is a conflict between the Federal Tort Claims Act and the Assignment of Claims Act. We have assumed, in spite of the wealth of authority to the contrary, that without the Federal Tort Claims Act a claim of a partial subrogee against the Government is barred by the Assignment of Claims Act. We have made this admission and assumption because if there be such a conflict between the two acts, this conflict is resolved in the light of the history and language of the Federal Tort Claims Act. This history and language demonstrates conclusively that the Assignment of Claims Act is impliedly repealed insofar as it bars the claim of a partial subrogee. "Where a consistent body of laws cannot be maintained without the abrogation of a previous law, a repeal by implication of previous legislation or of the common law is readily found in the terms of a later enactment. . . . Where there is an ambiguity in the statute the legislative intent is

the source of the compromise, but where a conflict is readily seen by an application of the later enactment in accord with that intent, it is clear that the later enactment is intended to supercede the existing law." 1 Sutherland Statutory Construction (3rd Ed) Sect. 2012.

The petitioner, however, contends that there are "affirmative considerations" which are demonstrative of a Congressional intent not to effect an implied repeal of the Assignment of Claims Act. (Petition p. 10.) Though none of these "affirmative considerations" are present in the instant case[1], they are: multiple suits resulting from splitting of causes of action, venue in districts other than that where the original claimant could have brought the action, defeat of the Government's right of counter-claim against the original claimant, and the increase of the number of persons with whom the Government must deal before the final discharge of its tort liability. These considerations present soluble procedural problems and they all have been raised in the courts below. *State Farm Mutual Liability Insurance Co. v. United States of America* (C.A. 1) Civil No. 4371, February 1, 1949; *Aetna Casualty and Surety Co. v. United States of America* 170 F(2) 469, 471 (C.A. 2); *Yorkshire Insurance Co. and Home Insurance Co. v. United States of America* 171 F(2) 374, 375 (C.A. 4); *United States of America v. South Carolina Highway Department et al* 171 F(2) 893, 898 (C.A. 4); *Grace et al v. United States of America* 76 F Supp 174, 178 (D.C. Md.); *Insurance Company of North America v. United States of America* 76 F Supp 951, 954 (E.D. Va.). These courts have found these problems to be capable of procedural solution and we shall not here burden this Court with their reason-

[1]In the instant case there was only one suit in one district, no counterclaim was involved, and the final judgment in the district court was in complete discharge of the Government's liability.

ing. We feel that the answer to these problems does not lie entirely in the fact that they are capable of solution but rests on this fundamental consideration: *they are the same problems with which a private person would be faced.* Congress has unreservedly dropped the cloak of sovereign immunity and has placed the Government on parity with a private litigant. The resulting procedural problems cannot now be urged by the Government as a basis for rising above the level of a private litigant; that basis must find its roots in the legislative history and language of the Federal Tort Claims Act, and in the past interpretation of the wording of other statutes in *pari materia.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

RODEY, DICKASON AND SLOAN

By PEARCE C. RODEY.

April 1949.

APPENDIX

STATUTES INVOLVED

1. Federal Tort Claims Act, Act of August 2, 1946, c 753, Title IV, 60 Stat. 842 et seq., 28 USC 921 et seq.

A. 28 USC 931 (a)

"Jurisdiction; liability of United States;

(a) Subject to the provisions of this chapter the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this chapter, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees."

B. 28 USC 943

"Claims exempted from operation of chapter

The provisions of this chapter shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, or 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-38 of Appendix to Title 50.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority. Aug. 2, 1946, c. 753, Title IV, § 421, 60 Stat. 845."

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 619

UNITED STATES OF AMERICA, PETITIONER

v.

YORKSHIRE INSURANCE COMPANY

No. 620

UNITED STATES OF AMERICA, PETITIONER

v.

THE HOME INSURANCE COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled cases on November 5, 1948.

OPINIONS BELOW

The United States District Court for the District of New Jersey did not write an opinion. The opinion of the United States Court of Appeals for the Third Circuit (R. 7-11, 15), is reported at 171 F. 2d 374.

JURISDICTION

The judgments of the United States Court of Appeals for the Third Circuit were entered on November 5, 1948 (R. 11, 12). A petition for rehearing, seasonably filed, was denied on December 6, 1948 (R. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the prohibition of R.S. 3477 (31 U.S.C 203), against the assignment of claims against the United States may be invoked by the United States to bar recovery of judgments against it under the Federal Tort Claims Act by two insurance companies, each claiming the right by subrogation to prosecute to judgment in its own name, as the "real party in interest," a portion of the claim of the insured against the United States.

STATUTES INVOLVED

Sections 1346 (b), 1346 (c), 1402 (b), and 2674 of Title 28,[1] United States Code, and the pertinent

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[1] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U.S.C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied

provisions of R.S. 3477 as amended, 31 U.S.C. 203, are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

A building in Asbury Park, New Jersey, under lease to the United States, was damaged by fire on February 18, 1945 (R. 2, 3). On July 11, 1947, respondent Yorkshire Insurance Company, filed an action against the United States under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843, in the United States District Court for the District of New Jersey, alleging that the damage to the property had resulted from the negligent refueling of an oil burner with gasoline by an enlisted man of the United States Navy acting within the scope of his employment, and that as the result of such negligence it was obliged to pay and did pay the owner, Emma R. Stuart, the sum of $3,842.06 (R. 1-2). A similar action was filed in the same court on the same day by respondent The Home Insurance Company, which alleged that it had been obliged to pay to its insured, Emma R. Stuart, the sum of $4,354.34 (R. 2-3). Each complaint sought judgment against the United States in the amount of $5,000 and costs (R. 2, 3).

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in the Federal Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.). The citations in this petition are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act.

Neither complaint contained any allegation as to the total amount of the damage caused by the fire or the extent to which other persons are interested in the claim.

The United States moved to dismiss each complaint on the ground that the Federal Tort Claims Act does not permit suits on derivative claims and that the actions were barred by R.S. 3477, 31 U.S.C. 203 (R. 3-6). The district court heard these motions together and entered an order dismissing the complaint in each case on the ground that the Federal Tort Claims Act does not grant consent of the Government to be sued by derivative claimants (R. 6).

Each respondent appealed, and the appeals were briefed and argued together (R. 8). The United States Court of Appeals for the Third Circuit sustained the right of an insurance company subrogee to sue under the Federal Tort Claims Act, holding that the equitable rights of the insurance company in any recovery by the insured qualified it as a real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure, and that the property owner and other insurers, if any, while necessary parties, are not indispensable parties[2] (R.

[2] Because the emphasis was placed on these procedural arguments on these appeals, rather than the purely substantive arguments advanced in the District Court, the Court of Appeals, being already of the opinion that the substantive arguments were not well taken, erroneously assumed that the Government was conceding the error of its substantive arguments (R. 8). A statement to this effect was included

7-11). It therefore reversed and remanded for further proceedings in the district court, stating that "if the plaintiffs can so present their case as to give the defendant the procedural protection it is entitled to, they may then have their chance to prove their case on the merits" (R. 11).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that both the insured and the insurer "own" portions of the substantive right against the tortfeasor.

2. In holding that a partial subrogee was entitled to recover judgment under the Federal Tort Claims Act against the United States in its own name as the "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure.

3. In holding that the property owner and other insurers, if any, are not indispensable parties to an action brought by an insurance company as partial subrogee on a claim for property damage.

4. In reversing the judgments of the district court.

REASONS FOR GRANTING THE WRITS

The Government's arguments as to the availability to it of the provisions of R.S. 3477, 31 U. S. C. 203, as a bar to a suit brought by a subrogee

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in the opinion, but it was removed by amendment after the Government clarified its position in a petition for rehearing (R. 15).

under the Federal Tort Claims Act are set forth at length in the petitions filed in *United States of America* v. *Aetna Casualty and Surety Company*, No. 617, and *United States of America* v. *World Fire and Marine Insurance Company*, No. 618. The Court's attention is respectfully referred to those arguments which are fully applicable in this case. Two additional features of the general problem involved are presented herein and require brief reference.

1. The question of the right of the respondents herein to recover judgment against the United States in their own name cannot be reached without a determination that R.S. 3477 is not available to the Government as a bar to such right. Decision of this question of substantive federal law will foreclose any inquiry into the procedural status of respondents as "real parties in interest" under Rule 17(a) of the Federal Rules of Civil Procedure. To the extent that the court below in these cases relied upon Rule 17(a), without reference to the basic substantive question, to sustain respondents' right to recover judgment, the decision is clearly in error. The status of an insurance carrier as a "real party in interest" is a question of substantive law on which state statutes and decisions are in considerable conflict and confusion. Rule 17(a) can do no more than act as a means whereby this uncertainty will confront

the Government in litigation under the Federal Tort Claims Act. Again, it is clear that such a result contrasts unfavorably with the simple solution which lies in the availability to the Government of R.S. 3477.

2. In the Government's petition in *United States of America* v. *World Fire and Marine Insurance Company,* No. 618, p. we have shown that sustaining the right of an insurance company as partial subrogee to recover judgment in its own name against the United States under the Federal Tort Claims Act results in permitting single causes of action to be split and prosecuted in different districts, the venue being laid wherever the insurance company is resident or doing business. The impropriety of such a result is emphasized by the ruling of the court below in these cases that neither the insured nor any co-insurers are indispensable parties in any such action (R. 10). This holding, of course, deprives the United States of even a make-shift procedural solution to the problem of multiplicity of suits, a problem which is of easy solution if our contention as to the availability of R.S. 3477 be accepted.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1949.

APPENDIX

STATUTES INVOLVED

1. Sections 1346 (b), 1346 (c), 1402 (b), and 2674 of Title 28, United States Code, as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess. [the provisions of the above sections having been formerly embraced in Sections 410 (a) and 411 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843-844, as amended by the Act of August 1, 1947, c. 446, Section 1, 61 Stat. 722, 28 U. S. C. 931 (a) and 932] provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * * * *

(b) Subject to the provisions of chapter 173 [3] of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance

[3] Apparently should read "171," since that is the number of the chapter on Tort Claims Procedure.

with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

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28 U. S. C. 1402. *United States as defendant.*

* * * * * * *

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory

damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

2. R. S. 3477 as amended, 31 U. S. C. 203, provides in pertinent part:

31 U. S. C. 203.

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments

for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

37

UNITED STATES OF AMERICA, PETITIONER

v.

YORKSHIRE INSURANCE COMPANY

No. 38

UNITED STATES OF AMERICA, PETITIONER

v.

THE HOME INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The United States District Court for the District of New Jersey did not write an opinion. The opinion of the United States Court of Appeals for the Third Circuit (R. 7-11, 15) is reported at 171 F. 2d 374.

JURISDICTION

The judgments of the United States Court of Appeals for the Third Circuit were entered on November 5, 1948 (R. 11, 12). A petition for rehearing, seasonably filed, was denied on December 6, 1948 (R. 15). The petition for certiorari was filed March 2, 1949, and was granted on April 25, 1949 (R. 16). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the prohibition by R. S. 3477 (31 U.S.C. 203) of the assignment of claims against the United States may be invoked by the Government to bar recovery of judgments against it under the Federal Tort Claims Act by two insurance carriers, each claiming by subrogation the right to prosecute to separate judgment in its own name, as the "real party in interest," a portion of the single claim of the insured original claimant against the United States.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act and of the statutes forbidding assignment of claims against the Government and providing for the counterclaim and offset against claims and judgments against the United States of the Government's cross claims against the plaintiff, are set forth in Appendix A to the brief for the United States in *United States* v. *Aetna Casu-*

alty and Surety Company, No. 35, this Term, and will not be repeated here.[1]

STATEMENT

A building in Asbury Park, New Jersey, under lease to the United States, was damaged by fire on February 18, 1945 (R. 2, 3). On July 11, 1947, respondent Yorkshire Insurance Company filed an action against the United States under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, in the United States District Court for the District of New Jersey, alleging that the damage to the property had resulted from the negligent refueling of an oil burner with gasoline by an enlisted man of the United States Navy acting within the scope of his employment, and that as the result of such negligence it was obliged to pay and did pay its assured the owner, Emma R. Stuart, the sum of $3,842.06 (R. 1-2). A similar action was filed in the same court on the same day by respondent Home Insurance Company, which alleged that it had been obliged to pay to its as-

[1] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U.S.C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied in the Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.). The citations herein are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Tort Claims Act.

sured, Emma R. Stuart, the sum of $4,354.34 (R. 2-3). Each complaint sought judgment against the United States in the amount of $5,000 and costs (R. 2, 3). Neither complaint contained any allegation as to the total amount of the damage caused by the fire nor as to the extent to which the original claimant or other persons are still interested in the claim.

The United States moved to dismiss each complaint on the ground that the Tort Claims Act does not permit suits on derivative claims and that the actions were barred by R.S. 3477, 31 U.S.C. 203 (R. 3-6). The district court heard these motions together with motions by respondents to substitute the original claimant as a new party plaintiff and entered an order dismissing the complaint in each case on the ground that the Tort Claims Act "does not expressly grant consent to suit by the subrogee of a claimant" and denying the substitution of the original claimant as time barred (R. 6).[2]

Each respondent appealed, and the appeals were briefed and argued together (R. 8). The United States Court of Appeals for the Third Circuit sustained the right of insurance company subrogees to sue under the Tort Claims Act, holding that the equitable rights of an insurance company in any

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[2] By the terms of the original limitation provision of the Tort Claims Act (sec. 420, 60 Stat. 845) suit on causes of action arising prior to its enactment on August 2, 1946, were required to be brought within one year of its enactment. Amendment of 28 U.S.C. 2401(b) by the Act of April 25, 1949 (P. L. 55, 81st Cong.) has since extended the limitation period until April 25, 1950.

recovery by the assured qualified it as a real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure, and that the property owner and other insurers, if any, while necessary parties, are not indispensable parties (R. 7-11).[3] It therefore reversed and remanded for further proceedings in the district court, stating that "if the plaintiffs can so present their case as to give the defendant the procedural protection it is entitled to, they may then have their chance to prove their case on the merits" (R. 11).[4]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that both the original claimant and each subrogated insurance carrier "own" portions of the substantive right of the original claimant against the United States as tort-feasor.

2. In holding that a partial subrogee was entitled to recover judgment against the United States in

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[3] Because the emphasis on oral argument was placed on these procedural aspects of these appeals, rather than the purely substantive arguments advanced in the district court and repeated in the Government's brief, the Court of Appeals, being of the opinion that the substantive arguments were not well taken, erroneously assumed that the Government was conceding the error of its substantive arguments (R. 8). A statement to this effect was originally included in the opinion, but was removed by amendment after the Government re-emphasized its position in a petition for rehearing (R. 15).

[4] Neither the action of the court below nor a reversal thereof by this Court can ultimately defeat the substantive rights of respondents. The Act of April 25, 1949, c. 92 (P. L. 55, 81st Cong.) has amended the limitation provision of 28 U.S.C. 2401(b) so that the original claimant may be joined as an additional plaintiff or a new suit brought in her name for the use of respondents.

its own name as the "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure.

3. In holding that the property owner and other insurers, if any, are not indispensable parties to an action brought by an insurance company on its equitable rights as partial subrogee of a claim for property damage.

4. In reversing the judgments of the district court.

ARGUMENT

The brief for the United States in the companion case of *United States* v. *Aetna Casualty and Surety Company*, No. 35, this Term, fully develops the reasons and authorities which establish the right of the United States to invoke R.S. 3477, 31 U.S.C. 203, as a bar to recovery of a judgment in its own name by a subrogated insurance carrier suing under the Tort Claims Act. Here it will be sufficient to summarize the contentions of the United States and to deal briefly with certain special contentions upon which the court below founded its decision of this case.

1. In sum, the Government contends that R.S. 3477 applies to equitable assignments by subrogation of claims under the Tort Claims Act just as fully as to any other transfer of a claim against the United States. An equitable assignment by subrogation falls within both the express language and the protective purposes of the statute. R.S. 3477 forbids every transfer or assignment, whether

equitable or express, of any claim against the United States which may in any way embarrass the United States in the settlement or compromise of the claim with the original claimant, or in any way interfere with the examination, allowance and payment of the claim by the proper officers of the Government, or with any action which such officers may legally take under statutes such as 31 U. S. C. 71 and 227, relating to the settlement and payment of claims against the United States. Such subrogees and other assignees can proceed only in the right and name of their transferors. As the Court of Claims stated in *Howes & Co.* v. *United States*, 24 C. Cls. 170, 184, "if attachments, subrogations, and assignments * * * should be upheld, the Government would not only be deprived of the right to settle with those claimants to whom it was originally indebted" but might also be involved in controversies between the subrogees or other assignees concerned in such transfers. If exempted from the application of R.S. 3477, such an equitable assignment by subrogation will destroy important statutory rights of the United States in respect of venue, counterclaim and offset just as effectively as could any written assignment.

Recognition of such equitable assignments will equally destroy the over-all scheme of simplicity and expedition in the handling of claims provided by the policy of R.S. 3477 which requires all claims, including those reduced to judgment, to be presented in the name of the original claimant. Indeed, they

result in harassment and uncertainty far exceeding that to which the United States is exposed by written assignments, which are admittedly within R.S. 3477. This is so because, unlike a written assignment, subrogation is secret and undisclosed in character, resulting from the legal consequences of acts and transactions between the original claimant and third parties concerning which the United States often has no notice and, even when informed, still lacks the detailed knowledge required for a correct appraisal. Far more than do express written assignments, equitable assignments by subrogation create uncertainties with possibility of double payment, and of multiple suits on the same claim; it greatly enlarges the possible choice of venue for suit and operates in many ways to the disadvantage of the United States. Allowing equitable assignees by subrogation to sue and recover in their own names may also require the United States to litigate complicated issues, between competing insurers and between insurers and the insured original claimant, not related in any way to the relatively simple issue of the Government's original liability to the original claimant for tort. There is thus even greater reason to apply R.S. 3477 to subrogation than to ordinary assignments.

Since an equitable assignment by subrogation of a tort claim is within the terms and purpose of R.S. 3477, it cannot be brought within any of the narrowly defined classes of transfers judicially

exempted from the all-inclusive terms of the Act, so as to permit the transferee to proceed to judgment in his own name. It is neither a universal succession to all property of the original claimant nor the transfer of an allowed claim after exercise by the United States of its rights of counterclaim and offset. Nor does the Tort Claims Act itself exempt equitable assignments by subrogation of claims arising under it. That Act does not in terms repeal the earlier statute, and any implied repeal is rebutted by the express reservation in the Tort Claims Act of the rights of the United States to counterclaim and to offset against payment of judgments which are protected by R.S. 3477.

The legislation culminating in the Tucker Act made the United States liable to suit on contract claims, but did not repeal R.S. 3477. *United States* v. *Gillis,* 95 U. S. 407, 414-416. The similar application of R.S. 3477 to tort claims in no way diminishes the liability of the United States under the Tort Claims Act nor does it in any way impair or prejudice the rights of insurance carriers to be reimbursed for their payments out of the judgment recovered by the original claimant. *United States* v. *Hill,* 174 F. 2d 61, modifying 171 F. 2d 404 (C.A. 5).

R.S. 3477 does not prevent the carrier from recovering any sums which it has paid to the original claimant whom it insured on account of damage for which the United States is liable under the Tort Claims Act as if it were a private person.

On the contrary, the application of R.S. 3477 simply requires the insurance carriers to recover in the name of their assured. Cf. *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474, affirming 32 C. Cls. 207, 223-226. Its sole purpose and effect is to preserve the Government's rights in respect of venue, counterclaim and offset, and to keep the Government out of disputes with third persons. And if action is brought by the insured original claimant in his name alone, without indicating the interest which his insurers have in the recovery, the insurers need not bring a separate suit. By intervening as parties plaintiff under Civil Rule 24, they can protect their equitable interest by obtaining an express declaration in the judgment of their right to payment out of its proceeds. Compare *United States* v. *Hill, supra,* with *Employers' Fire Ins. Co.* v. *United States,* 167 F. 2d 655 (C.A. 9); and see *Williams* v. *Powers,* 2 F.R.D. 362 (N.D. Ohio).

This method of recovery is one which the insurance carriers can and constantly do practice. Their substantive rights are fully protected in this established method of recovery, while the United States obtains a valid discharge of its liability. The Government's argument applies with particular force to the case at bar. One of the important purposes of R.S. 3477 is to prevent splitting of claims and consequent multiple suits and judgments. *Hobbs* v. *McLean,* 117 U. S. 567, 576. In the present case, a single original claim has been split into three

claims: (1) that of a partial insurer; (2) that of second partial insurer; and (3) that of the owner of the damaged property for the uninsured portion of the property's value. Finally, a judgment in favor of the carriers will cut off any offset which the Comptroller General would otherwise assert, pursuant to 31 U. S. C. 227, against a judgment in favor of the original claimant. (See letter of the Comptroller General, Appendix B, pp. 70-74, of the Government's brief in No. 35.)

2. The court below in denying the application of R. S. 3477, took the view that the matter was only a procedural problem and attempted instead to deal with it as a mere case of multiple suits which could be resolved through the application of the Federal Rules of Civil Procedure relating to parties. It held that since a partial insurer is a real party in interest, entitled under Rule 17(a) to sue in its own name, the Government could be protected against splitting of the cause of action by moving to join all other insurers and the original claimant as necessary parties to the action. But the first objection to this disposition of the case is that (as pointed out by the Government's brief in No. 35) R. S. 3477 has not been repealed by the Rules of Civil Procedure any more than by the Tort Claims Act, even though the rules may be thought to provide an alternative method, where partial subrogees are involved, of reaching the same result as does the act of Congress.

In fact, however, the Civil Rules do not provide protection to the United States equal to that of R. S. 3477. The doctrines of real party in interest and necessary, but not indispensable, parties do not preserve the basic rights of the United States concerning venue and counterclaim and to have judgment entered in the name of its original claimant so as to obtain for the United States a valid discharge by payment and to enable it to exercise its rights of offset. On the contrary, the court's application of the real party in interest rule deprives the United States of the benefit of the full protection provided by those statutes because it operates to substitute the carrier for the insured original claimant as the actual plaintiff of the suit and judgment to whom alone the protective statutes apply. See 28 U.S.C. 1346(c), 31 U.S.C. 71 and 227.

Indeed, the rule of real party in interest does not even prevent the possibility of several suits on the same claim. According to the court below, the other parties having an interest in the divided claim being "necessary" but not "indispensable" parties, if suit is brought by any one of the parties having an interest in the divided claim and the others are beyond the jurisdiction of the particular district court or cannot for any reason be made parties to the suit, the court may still proceed under Rule 19(b) to frame a limited judgment in the name of the present insurer-plaintiffs on their part of the original claim. As a result, the United States could

be required not only to litigate the same issues arising out of the same transaction in more than one suit but in addition to litigate possible new issues as to the rights of the various parties to share in the proceeds of the original claim. And in such subsequent suits, neither the question of the existence and extent of the subrogation nor that of liability would be *res judicata* as to the new parties. It is thus entirely foreseeable that the United States might be held liable twice for the full amount of the original claim—first to a plaintiff held to be a subrogated insurer, then, in the later action, to a plaintiff held to be an original claimant who had not subrogated his insurer.

We believe that in fact, however, the court below erred and that the insured original claimant is the most indispensable of parties, since without her presence no binding adjudication as to the existence and extent of the subrogation can be obtained and payment of the insurer's judgment may not give the United States a valid discharge even *pro tanto*. These circumstances, we believe, meet all traditional tests as to indispensability. *Shields* v. *Barrow*, 17 How. 130. See 3 Moore, *Federal Practice* (2d ed., 1948) § 19.07. Indeed, in *Flynn* v. *Brooks*, 105 F. 2d 766, 767 (C.A. D.C.), it was held that the validity of an assignment could not be adjudicated without the presence of both assignor and assignee and that although the point had not been raised in the district court the court of appeals could take notice of the defect and remand in

order to require the joining of the absent party or the dismissal of the suit. Cf. *Hoe* v. *Wilson*, 9 Wall. 501. Since no reason exists to distinguish the present case of equitable assignment by subrogation nor to differentiate between the absence of the assignor or subrogor instead of the assignee or subrogee, we believe that the view taken of the present cases by the court below required it to follow the same course here.

The court below, in apparent reliance on the discussion found in 2 Moore, *Federal Practice* (1938) § 17.08 (see also 3 Moore, *Federal Practice* (2d ed., 1948) § 17.09), assumed the fact that the treatment of a subrogee insurer might be assimilated to that of a partial assignee fully disposed of the Government's contentions. Disregarding that the partial assignee admittedly is forbidden by R. S. 3477 to sue and recover judgment against the United States in his own name and that the court's analogy ought, therefore, to require that suit by a subrogee be barred, we submit in all deference that both the court below and the learned commentator on the Civil Rules have ignored the complications and difficulties of the right of subrogation as it is actually met in practice, and have considered a case that is presented only where an express written assignment is involved. After all, few questions are more thorny and productive of complicated litigation than the existence and extent of a right of subrogation in favor of an

insurer.[5] It is for this reason that it is the almost invariable practice of insurance and surety companies to make no payment without taking the assured's assignment. (See *e.g.*, No. 36, R. 12, 16.) And with reason, for only pursuant to the original claimant's express assignment (admittedly invalid under R. S. 3477 where the United States is concerned) can the tortfeasor ultimately liable pay the putative subrogee with any confidence that the payment will result in a valid discharge of his debt to the original claimant. Moreover, claims in tort for personal injury or property damage are always unliquidated, and the United States can be sure that it has fully discharged its liability only if it is not prevented from effecting direct settlement with the claimant or from obtaining an adjudication of the claim in an action to which the original claimant is a party. The assured and the insurer generally differ widely in their views as to what amount constitutes full indemnification, and the sum ultimately accepted by the assured in settlement of his claim against the insurer under the

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[5] The question of whether in fact the insurance company is subrogated is a prolific source of complicated litigation. See *e.g.*, *Crab Orchard Improvement Co.* v. *C. & O. Ry. Co.*, 115 F. 2d 277 (C.A. 4); *Mercer Casualty Co.* v. *Perlman*, 62 Ohio App. 133, 23 N.E. 2d 502; *Standard Marine Ins. Co.* v. *Scottish Metropolitan Assurance Co.*, 283 U. S. 284. As observed in *Suttles* v. *Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y.S. 1024, "The theory and basis of the right of the insurer to subrogation is that the insured has a claim against a third person, which he could enforce for the loss insured against. But * * * it does not follow in all cases where there has been a loss that the insurer is entitled to be subrogated to every means available to the insured for recouping his loss."

policy is usually a compromise figure which is substantially less than the claimant would expect to recover in an action against the person responsible for the damage. Payment of this amount to the insurer, whether administratively or pursuant to a judgment, will not necessarily discharge the United States nor free it from further controversy with its original claimant.

But the original claimant is an indispensable party for yet another reason. It was well settled in the federal courts long prior to the adoption of the Rules of Civil Procedure that where insured property had been destroyed by a wrongdoer and the insurance company had paid the owner less than the full value of the property the right of action against the tortfeasor remained in the property owner for the entire loss. *Chicago, Etc. Railroad Co.* v. *Pullman Car Co.*, 139 U. S. 79, 87-89; *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 370, 373; *Firemen's Ins. Co.* v. *Bremner*, 25 F. 2d 75 (C.A. 8); *Southern Bell Telephone & Telegraph Co.* v. *Watts*, 66 Fed. 460, 464 (C.A. 4); *Norwich Union Fire Ins. Soc.* v. *Standard Oil Co.*, 59 Fed. 984, 987 (C. A. 8); *Aetna Ins. Co.* v. *Hannibal & St. J. R. Co.*, 1 Fed. Cas. No. 96, at p. 208. See *Over* v. *Lake Erie & W. R. Co.*, 63 Fed. 34 (C. C. D. Ind.). While these decisions were based largely on the common law rule that the legal title to a right of action in tort always remained in the person injured and consequently the right could be asserted only in his name (*United*

States v. *American Tobacco Co.*, 166 U. S. 468, 477), the result is equally sustainable under the general rule that an insurer is not entitled to the rights of equitable subrogation unless the full amount of the insured's loss has been paid. *American Surety Co.* v. *Electric Co.*, 296 U. S. 133, 137; 8 Couch on *Insurance*, secs. 1997, 2019. The insurer is entitled to nothing until the injured party has been fully indemnified, so that by their very nature the rights of the subrogee are subordinate. On the other hand, to hold, as has the court below, that a partial subrogee is entitled to sue and recover in its own name without joining the original claimant as an indispensable party makes it co-equal with the subrogor, with the same right which he has to proceed independently against the tort-feasor. This will not only serve to embarrass the subrogor in his efforts to recover from the tort-feasor, but authorizes the harassment of the tort-feasor by multiple suits. The rule against such splitting of causes of action is fundamental in federal law. *Baird* v. *United States*, 96 U. S. 430; *Baltimore S. S. Co.*, v. *Phillips*, 274 U. S. 316, 321. The injured party has legal title to the entire cause of action and the prosecution of the action by him alone will save the United States from further harassment and vexation at the hands of other claimants to the same demand.

We believe that the court below erred and that, where an insurance carrier can claim only a partial subrogation, the correct and only workable rule

is that the person originally sustaining the loss is the "real party in interest" under Rule 17(a). *Dayton Veneer & Lumber Mills* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 1 F.R.D. 444 (E.D. Tenn.). See *Lloyd Moore, Inc.* v. *Schwartz*, 26 F. Supp. 188 (E.D. Pa., 1938). Cf. *Par-X Uniform Service Corp.* v. *Emigrant Indus. Sav. Bank*, 268 App. Div. 699, 53 N.Y.S. 2d 16. The original claimant is the legal owner of the entire claim, holding part of it in trust for the reimbursement of the insurers and therefore entitled to sue in their behalf as well as his own.[6]

The courts which have held that a partial subrogee is a real party in interest, and hence may maintain an action in its own name against the tortfeasor, have based their ruling on the fact that the subrogee was entitled to share in the recovery ultimately effected. But if this were the test, the insurance company would be a real party in interest in every case where it was entitled to share in any recovery from the tortfeasor, and yet the courts have uniformly held that where the insurance company "lends" money to its insured on a "loan receipt," the money to be repaid only out of any recovery from the alleged tortfeasor, the insured is the real party in interest entitled to sue and recover as to the entire claim. *Augusta Broadcasting Co.* v. *United States*, 170 F. 2d 199

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[6] This is true *a fortiori* where R. S. 3477 is involved, for the statute makes the original claimant "a party authorized by statute" within the meaning of Civil Rule 17(a).

(C. A. 5); *First Nat. Bank of Ottawa* v. *Lloyd's of London*, 116 F. 2d 221, 225 (C. A. 7); *Price & Pierce* v. *Jarka Great Lakes Corp.*, 37 F. Supp. 939, 943-944 (W. D. Mich.); *Yale Transport Corp.* v. *Yellow Truck & Coach Mfg. Co.*, 3 F. R. D. 440 (S. D. N. Y.); *Kerna* v. *Trucking Inc.*, 3 F. R. D. 365 (W. D. Pa.). See *Western Fire Ins. Co. of Fort Scott, Kan.* v. *Word*, 131 F. 2d 541, 543 (C. A. 5). Yet the equity of the insurance carrier is the same, whether it makes an outright payment under the policy or takes a "loan receipt." In either case it is entitled to share in the recovery from the tortfeasor and will never be indemnified unless there is such a recovery. Cf. *Sullivan* v. *Naiman*, 130 N. J. L. 278, 32 A. 2d 589. The effect of the lower court's view is that Rule 17(a) operates as a statute of uses which converts the equitable interest of a partial subrogee to a *pro tanto* legal interest, giving it the right to maintain an action in its own name. That it does not so operate on the equitable interest of an insurer which takes a loan receipt demonstrates, we submit, that the cases which support the contrary contention are unsound in principle.

By contrast to these difficulties engendered by the solution of the court below, the application of R. S. 3477 permits only one suit in the name of the original claimant (cf. *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474); only one judgment in the name of the original claimant, subject to such charges upon that judgment in favor of

attorneys, subrogees, and others as their interests may appear (see *United States* v. *Hill*, 174 F. 2d 61, modifying 171 F. 2d 404 (C. A. 5)) and only one payment which will both give the United States its valid discharge by satisfaction of the judgment and its right to offset its claims against the original claimant. (See letter of the Comptroller General, Appendix B, pp. 70-74, of the Government's brief in No. 35). Such a judgment was entered in the *Hill* case and, we submit, meets all the issues present in the adjudication of tort claims against the United States without prejudice or inconvenience to any party.[7]

We therefore re-invoke the application of R. S. 3477, but submit that in any view of the case the court below erred in reversing the judgment of the district court which had dismissed the complaint on the ground that respondents, as derivative claimants to parts of their assured's claim against the United States, could not maintain these actions in their own names. In view of the extension of

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[7] We disregard as without particular significance for the United States, the question of the jurisdiction of the district court when sitting as a court of claims to decide questions of derivative claims. While raised by the United States in the district court (R. 3-6), the question is one affecting primarily the power of the court to adjudicate rights between different insurers and their assured as to the existence and extent of subrogation. Whether the matter is so far ancillary that diversity of citizenship is not required, and whether the subject matter is so far equitable that a jury cannot be demanded, are questions to be settled in litigation between the interested parties. But compare *United States* v. *Sherwood*, 312 U. S. 584, 591, with *National Mutual Ins. Co.* v. *Tidewater Trf. Co.*, 337 U. S.

the limitation period until April 25, 1949 (see *supra*, p. 5, fn. 4), we believe the district court should now order the actions consolidated and grant respondents' motions to substitute the original claimant as plaintiff.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is erroneous and should be reversed, and the cause remanded to the district court with instructions to consolidate the actions and order the original claimant substituted as plaintiff in the action.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
LEAVENWORTH COLBY,
SAMUEL D. SLADE,
JOSEPH KOVNER,
Attorneys.

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BRIEF FOR RESPONDENTS

ABRAHAM FRANKEL,
Attorney for Respondents.

ADAMS PRESS, 11 Commerce Street, Newark, N. J. MArket 3-8611

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BRIEF FOR RESPONDENTS

The respondents have no objection to petitioner's statement of the opinion below, the jurisdiction and the statutes involved.

The statement of facts presented by the petitioner is substantially correct, requiring only the following clarification. The total amount of the property damage loss caused by the fire is covered by the payments made by the respondents. It is not to be inferred, as intended by the United States, that outstanding claims exist in the insured or other persons with respect to the property damage loss (Br. 4).

Question Presented

1. Whether two insurance company subrogees may sue the United States in their own names, as real parties in interest, on claims admittedly actionable under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842,[1] and whether such suits are prohibited by the language of the Federal Anti-Assignment Statute, R.S. 3477, 31 U. S. C. 203.[2]

Preliminary Analysis

Respondents will argue the following points:

1. A subrogee, partial or whole, is an equitable assignee by operation of law and such claim is actionable under the Tort Claims Act and does not fall within the prohibition of R.S. 3477.

2. A subrogee, partial or whole, is the holder of a substantive right under the Tort Claims Act, qualifies as a real party in interest under Rule 17a of the Federal Rules of Civil Procedure, and may sue the United States in its own name.

Preliminary Comment

A review of the positions assumed and the legal arguments advanced by the United States in this Court and in the Courts below have been wholly inconsistent and irreconcilable requires comment thereon for purposes of enlightenment. The United States has pursued a course of changing and shifting its position in each Court in these proceedings. The primary and basic issues involved have become deeply confused and largely beclouded by such legalistic gyrations.

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[1] Hereinafter referred to as the Tort Claims Act.

[2] Hereinafter referred to as R.S. 3477.

In the District Court the United States attacked on purely substantive grounds, the right of a subrogee to sue. It moved for dismissal of the complaints on two grounds; first, that the Tort Claims Act did not permit derivative suits; and secondly, that the suits were prohibited by the terms of R.S. 3477 (R. 4-6). On examination of the Order of Dismissal in the District Court it appears that the judgment of the Court was based entirely on the first ground, since R.S. 3477 was not urged by the United States and was not considered by the Court. The order fails to disclose any mention of or reference thereto (R. 6). We may conclude that the disposition of the motions in the District Court was based solely on a substantive ground. The Court applied a rigid and narrow construction of the Tort Claims Act and rested its decision on the ground that the Tort Claims Act "does not expressly grant consent to suit by the subrogee of a claimant and that consent of the government to be sued being a relinquishment of sovereign immunity, must be strictly interpreted (R. 6)."

The respondents appealed to the Court below to establish the substantive right of a subrogee to sue under the Tort Claims Act and establish that such suit was not precluded by R.S. 3477. The respondents moved forward to test the questions on purely substantive arguments and the brief filed below treated the subject in such manner. Although the United States contended in its petition for rehearing (R. 13, 14) that it did not abandon its position in the Court below and conceded that a subrogee may sue under the Tort Claims Act and is not precluded by R.S. 3477, it is clearly evident from the opinion of the Court below that the United States retreated from its former position. It did not press the points urged in the District Court and made objection on purely procedural grounds (R. 7-11, 15). The United States no longer contended that a subrogee did not enjoy a substantive right under the language and purposes of the Tort Claims Act. It attempted to defeat this substantive right on proced-

ural grounds that it raised for the first time in the Court below (R. 10).

The final shift in the argument of the petitioner is now made in this Court. For the first time, R.S. 3477 heretofore abandoned in the Court below, is raised as a substantive ground to bar a suit in the name of an insurance company subrogee.

Argument

I. The United States invokes R.S. 3477, to bar a recovery of a judgment by an insurance company subrogee suing in its own name under the Tort Claims Act. It contends that R.S. 3477 forbids every transfer or assignment, whether equitable or express, and that the right of a subrogee falls within both the express language and alleged protective purposes of the statute (Br. 6, 7). The government now urges for the first time that the policy, function and purposes of R.S. 3477 was adopted to protect certain statutory and administrative rights in the settlement, compromise, or prosecution of claims against the United States.

It is our contention that R.S. 3477 does not apply to a suit by a subrogee under the Tort Claims Act. The government assumes that an equitable assignment by subrogation falls within both the express language and the protective purposes of the statute (Br. 6). We submit that a subrogee, an equitable assignee of a claim by operation of law, does not come within the prohibition of said act. *American Tobacco Co.* v. *United States*, 166 U. S. 468, affirming 32 C. Cls. 207; *Western Pacific Railroad Company* v. *United States*, 268 U. S. 271. The Circuit Courts of this land, in dealing directly with the statute, have expressly repudiated the contention made by the government. *State Farm Mutual Liability Insurance Co.* v. *United States of America*, 172 F. 2nd, 737 (C. A. 1); *Aetna Casualty and*

Surety Co. v. *United States of America*, 170 F. 2nd, 469 (C. A. 2); *United States of America* v. *South Carolina Highway Department, et al.*, 171 F. 2nd, 893 (C. A. 4); *Old Colony Insurance Co.* v. *United States of America*, 168 F. 2nd, 931 (C. A. 6); *Employers Fire Insurance Co.* v. *United States of America*, 167 F. 2nd, 655 (C. A. 9); *United States of America* v. *Donald Harding, et al.*, 171 F. 2nd, 550 (C. A. 10); *United States of America* v. *Chicago, Rock Island & Pac. Ry. Co.*, 171 F. 2nd, 377 (C. A. 10); *National American Fire Insurance Co. of Omaha* v. *United States*, 171 F. 2nd, 206 (C. A. 9); *3 Moore Federal Practice* (2nd Ed. 1948) Sec. 17.09, p. 1349.

The broad and sweeping waiver of governmental immunity against suit under the Tort Claims Act is not to be limited by the prohibition contained in R.S. 3477 if the liberal purposes and objects of the Tort Claims Act are to be completely effectuated. It can not be gainsaid that the government in its brief and in the briefs filed in the companion cases of *United States* v. *Aetna Casualty and Surety Company*, No. 35 this Term, and *United States* v. *World Fire and Marine Insurance Company*, No. 36 this Term, does not freely admit that a subrogee enjoys a substantive right under the Tort Claims Act. The government now questions and attacks in these cases the method of procedure and the manner in which the claim of a subrogee can be enforced. The government resists the right of a subrogee to sue in its own name as being in violation of R.S. 3477 (Br. 9, 10). Upon admission of the substantive right, we submit that no restraints or restrictions can be imposed thereon to prevent the complete fulfillment of such right by recovery of a judgment in the name of the subrogee.

To overcome the established law exempting the claim of a subrogee from the prohibition of R.S. 3477, the government presents a specious and untenable argument. It

contends that R.S. 3477 must be invoked as a bar to an action by a subrogee because the policy, purpose and function of the act provides the government certain protection in regard to statutory and administrative rights to which it is entitled in the handling of claims against the United States.

It must be kept in mind that R.S. 3477 was enacted in 1853 at a time when the doctrine of sovereign immunity was deeply rooted in the jurisprudence of this land. The principal object of the statute was to protect the government and prevent frauds upon the Treasury of the United States. Indeed, the act is so entitled. *Western Pacific Railroad Company* v. *United States*, 268 U. S. 271; *United States* v. *Gillis*, 95 U. S. 407. The government now seeks to extend the application of the act by ascribing to it certain purposes, policy and function that did not exist at the time of its enactment and were never contemplated by Congress in the passage of this law. It would be a strange construction of the act to hold that it protects the government in regard to certain statutory rights and administrative benefits which were non-existent at the time of the enactment of the law.

In pressing for an extension of the application of R.S. 3477 the government maintains that the purposes and objects of the statute were intended to afford to it the following protective rights. For purposes of convenience we divide these matters into two categories, administrative and judicial.

1. Administrative

(a) No embarrassment to United States in settlement and compromise of claim with original claimant.

(b) No interference with examination, allowance and payment of claim by proper officers of United States.

(c) Preserve simplicity and expedition in handling of claims.

(d) Avoid harrassment and uncertainty far exceeding that to which United States is exposed in written assignments for the reason that subrogation is secret and United States has no notice or lacks detailed knowledge required for correct appraisement.

2. Judicial

(a) No interference with any action United States may take by way of offset under 31 U. S. C. 71 and 227.

(b) Protect United States from involvement in controversies between subrogees or other assignees, and compel United States to litigate complicated issues between them and insured.

(c) Preserve to government important statutory rights as to venue and counterclaim.

(d) Protection against possible double payment and multiplicity of suits.

Assuming, but not conceding, that the purposes of R.S. 3477 may be extended to provide the government with the above enumerated protective rights, we submit that such rights are neither impaired nor expunged in a suit by a subrogee in its own name. By the doctrine of subrogation, the insurer upon payment to its insured of a loss, total or partial, becomes subrogated in a corresponding amount to the insured's cause of action against the tortfeasor. The right of a subrogee arises independently of contract or any formal assignment. *Liverpool and Great Western Steam Company* v. *Phenix Insurance Company*, 129 U. S. 397; *Aetna Life Insurance Co.* v. *Middleport*,

124 U. S. 534. On payment of a loss by way of indemnification, a substantive right is conferred upon the insurer by the doctrine of subrogation. The insurer then becomes the equitable holder and owner of the cause of action against the third party tort-feasor to the extent of the payment made. The insurer now stands in the very shoes of the insured in asserting this cause of action against the tort-feasor. Since equitable title to the claim is held by the subrogee, the party to whom payment should be made and with whom all negotiations should be had concerning the claim, we fail to perceive how the government will be prejudiced in the exercise of any statutory or administrative rights. On payment of the property damage loss by the insurer to the insured, the interest of the insured in a cause of action against the tort-feasor has been expunged to the extent of such payment. To this extent, a cause of action exists in favor of the subrogee under the Tort Claims Act. In the first instance, the loss is that of the insured, after reimbursement or compromise, it becomes the loss of the insurer. *Old Colony Insurance Company* v. *United States, supra.* The subrogee becomes the equitable owner of the very rights of the individual who suffered injury to his personal property. *Niagara Fire Insurance Company* v. *United States,* 76 F. Supp. 850, 855.

In view of the universal practice in the handling of subrogation claims, the third party tort-feasor is not exposed to any peril, harrassment, uncertainty, delay or interference with the examination of or possible settlement and compromise of such claims in dealing directly with the subrogee rather than the insured. There is nothing secret or mysterious about the nature or character of a subrogation claim, as charged by the government (Br. 8). The existence and extent of subrogation as shown in the instant cases are readily disclosed by the mere examination of the complaints filed (R. 1-3). To obtain correct appraisal of

said subrogation rights and more detailed information concerning the existence and extent thereof, the machinery concerning discovery in the Federal Courts is available to the United States as to any other private litigant under the Federal Rules. On the contrary, an action filed in the name of the insured only without indicating the rights or interests of an insurer is far more secretive than a suit filed in the name of the subrogee.

The government misconceives the practical aspects of subrogation when it seeks to preserve its right to deal with the insured who has no further interest in the claim. As shown above, the insurer is the owner of the cause of action to the extent of payment made and therefore is the proper party to be dealt with. The government will be subjected to harrassment, embarrassment and delay if it deals with the insured and not the insurer.

The government complains that it may become embroiled in conflicting claims of the insurers or in disputes between the insurers and the insured. Assuming for this argument that the government is entitled to protection against embroilment and conflicting claims, the objection raised does not apply herein. Such problems have no basis in fact, they are creatures of an imaginary hypothesis. The disputes that may arise between insurer and insured precede the settlement and payment of the loss. The sums due from each carrier on the adjustment of a fire loss may possibly create disputes between them before a complete adjustment of the loss is concluded. On final adjustment, such disputes have been previously resolved and precede payment of the loss to the insured. Thus it is observed that disputes, if any, between insurers and insured or between co-insurers are settled before payment is made. Since the right of subrogation arises after payment is made, the assertion of such right by a subrogee against the government can not embroil the United States in conflicting claims and disputes.

The foregoing discussion has been devoted to a treatment of the administrative problems, which we submit do not exist in the instant cases or in the administration of subrogation claims generally. Assuming that such problems may arise, the same are not insuperable and are readily soluble without imposing any hardship or burden upon the government. We submit that such administrative problems, under no circumstances, should defeat the substantive right of a subrogee to sue in its own name.

The second class of objections characterized above as judicial, relates to the government's contention that the sole purpose and effect of R.S. 3477 is to preserve the government's rights in respect of venue, counterclaim and offset, and further, to avoid the possibility of double payment and multiplicity of suits (Br. 8, 10). It is a strained argument that suggests that the purposes and objects of R.S. 3477 shall be construed to afford such statutory rights to the government. Assuming these rights do exist, we submit the same are not violated by a suit in the name of a subrogee under the Tort Claims Act.

A venue provision is found in the language of the Tort Claims Act. It provides that a tort action against the United States shall be filed in the district where the plaintiff resides or where the tort occurred, 28 U. S. C. 1402 (b). The instant suits were filed in accordance with that provision in the district where the alleged cause of action arose. The suits were filed in the very district where the insured resides. The government has not been harmed with regard to its right of venue. The objection with respect to venue has no merit from a practical appraisal of an ordinary subrogation suit. Since the rights of the insurer depend solely upon the rights and remedies of the insured, the suit will generally be filed in the judicial district where the insured resides or the cause of action arises.

The government urges next that it will be deprived of the statutory right of counterclaim against the insured if a

suit is permitted in the name of the insurer subrogee. This question was recognized and satisfactorily disposed of in the learned opinion rendered in the Circuit Court in the companion case of *Aetna Casualty and Surety Company* v. *United States, supra.* The Court stated at 170 F. 2nd, 471:

> "Although we do not know whether the government intends to assert a counterclaim in this case, we cannot reserve consideration of this argument until a case arises involving a counterclaim; we think Congress did not intend to make the 'involuntary' assignee's right to sue dependent upon the government's assertion or non-assertion of a counterclaim against the employee."

It does not appear in the instant cases that the government intends to assert a counterclaim against the insured. Following the date of entry of judgment in the Court below and prior to the application for a writ of certiorari in this Court, the government filed an answer of general denial in the District Court. Therefore, the question of asserting a counterclaim is not before the Court.

Assuming the government desires to assert a counterclaim against the insured, we submit this right is not prejudiced or denied in a suit filed by a subrogee in its own name. The government may obtain this relief by making timely application to join the insured in this suit under Federal Rule 19 (b). The insured resides within the jurisdiction of the Court where suit was filed and is amenable to the service of process. The fundamental right of a subrogee to sue in its own name is paramount and not to be defeated by the procedural problems that may face the government in asserting a counterclaim against the insured.

The offset statute, 31 U. S. C. 71 and 227, is raised by the government to narrow a construction of the Tort Claims Act and deprive a subrogee the right to sue in its

own name. A statutory offset is, by its very nature, a defensive measure. It must be governed by the rules of procedure relating generally to counterclaim and set-off. By the very language of the offset statute, the government is not denied any fundamental right as it may assert this right of offset in an affirmative suit if the indebtedness to the government is denied. Certainly a right which is asserted only after judgment is recovered is not the test or criterion to determine in whose name suit should be filed. We submit that the fundamental right of subrogation, conferred upon the respondents under the Tort Claims Act, should not be limited or restricted by this statutory right of offset, and in this sense this objection should be relegated to the inoffensive category of counterclaim and set-off. *State Farm Mutual Liability Insurance Co.* v. *United States of America, supra; Aetna Casualty and Surety Co* v. *United States of America, supra; United States of America* v. *South Carolina Highway Department, et al., supra.*

The final objection raised by the government is that R.S. 3477 intended to protect it against splitting of a cause of action and consequent multiple suits. We submit that the government is not subjected to a multiplicity of suits in these cases. A single tort may give rise to several claims that are cognizable under the Tort Claims Act. In the present cases the total property damage loss for which recovery is being sought is represented by the two suits filed by the respondents. This question was considered and resolved most satisfactorily by the Court below. The Court stated as follows (R. 9-11):

> "The only reason for preventing suit by the partial subrogee alone, is, as in the case of the partial assignee, to preclude inconvenience and expense to a defendant who might be required to defend a number of separate suits arising out of a single claim, if the rule were otherwise. It is, therefore, clear that the rule of one claim, one lawsuit, is for the benefit

of the defendant, and he is the one who should make a timely claim to join the necessary parties. It is a right which may be waived by a defendant, and it has been so held in federal cases applying state procedural codes under the Conformity Act and by state courts."

"The United States should have immunity from a multiplicity of suits upon one obligation; but it should pay that obligation if it is found to exist under the statute. It appears that a motion to add further parties was made and dismissed by the District Court for coming out of time. If the property owner is barred by lapse of time and there are no other claimants the defendant need not be subjected to a multiplicity of suits. Rule 42 providing for consolidation is very broad; so is Rule 21 for adding or dropping parties. The liberal provision for amendment in Rule 15 makes possible the allegation of existence or non-existence of other possible claimants"

A case involving an analogous situation is found in *Gaugler* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79, 82 (D. Ct., D. Mont., 1912). The Court stated as follows:

"It is clear there is no separable controversy herein. There is but a single cause of action involved, viz., the right of the insured, the invasion thereof by the negligence of defendant in the destruction of the insured's property, and the damages thereby inflicted. That the insurers are equitable assignees of the insured are interested therein to the extent of their payments to the insured, and are interested in proving the negligence and in sharing the damages, does not create other causes of action, legal or equitable, against defendant. It is still one cause of action, a single controversy owned in common by the insured and the insurers."

This problem of splitting of causes of actions and possible multiplicity of suits must necessarily be resolved under the Federal Rules of Civil Procedure relating to con-

solidation of actions and the adding and dropping of parties (Federal Rules 21, 42). *United States of America* v. *South Carolina Highway Department, et al., supra.* A claim of a subrogee, whether partial or whole, is not a divided one but represents a separate and distinct cause of action in its favor by reason of having made payment to the insured and is subrogated in a corresponding amount to the insured's right of action against the tort feasor. To protect a defendant, the several claims arising from a single tort should properly be joined in one suit. The government, in these cases, can receive similar protection by way of consolidation (Federal Rule 42). The claims of subrogees are not split or divided ones, but represent a substantive right that each subrogee enjoys to the amount of the loss which it paid and the aggregate of such claims represents the whole property damage loss caused by the tort feasor. There is nothing in the record at this stage to indicate that the insured has any claim arising from the loss and clearly she has no interest in the claims of the insurers.

To conclude, we submit that by the very language of the Tort Claims Act itself, claims filed thereunder are to be governed by the Federal Rules of Civil Procedure, 60 Stat. 844, Sec. 411. The so-called statutory rights and other protection sought by the government, which it contends was intended by R.S. 3477, are secured to the government by proper application of the Federal Rules. However, we submit further that R.S. 3477 does not apply to a suit by a subrogee in its own name. Statutory rights or other protective rights sought by the government are not damaged or destroyed by the refusal to invoke the provisions of R.S. 3477.

2. The second part of the government's brief deals more particularly with the decision of the Court below. It is based upon the erroneous premise that the lower Court

declined to apply R.S. 3477 and considered the questions as procedural ones to be resolved through the application of the Federal Rules of Civil Procedure. The lower Court was not called upon to consider the prohibition of R.S. 3477, so consequently, its decision is not grounded upon any construction of said statute. The government now contends that the lower Court erred in holding that a subrogee is a real party in interest under Federal Rule 17 (a), entitling it to sue in its own name, as it denies the government the right to assert and exercise certain statutory rights similar to those heretofore raised in its attempt to invoke R.S. 3477 as a bar to a suit by a subrogee in its own name. *Ergo*, the alleged denial of such statutory rights disqualifies the insurer as a real party in interest.

The government impliedly admits that the Federal Rules of Civil Procedure on proper application, provide it with the protection that is sought (Br. 11). It urges that greater protection is secured to it by R.S. 3477 (Br. 11, 12). In sum, the government maintains again that permission to a subrogee to sue in its own name either damages or destroys the basic rights of the United States concerning venue, counterclaim, offset, possible double payment and multiplicity of suits.

We submit that all of these matters are not material in the present cases, nor to subrogation cases generally. They present defensive measures that do not determine in whose name a suit may be filed.

In view of the government's admission that a subrogee holds a substantive right for recovery under the Tort Claims Act, and is entitled to be paid for a tort committed by the government that is actionable under the Act, the simple issue for decision is whether a subrogee is a real party in interest under Federal Rule 17 (a), and permitted to file a suit in its own name (Br. 9, 10). Under Federal Rule 17 (a), requiring every action to be prosecuted in the

name of the real party in interest, it is well settled that an action should be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced. 3 Moore Federal Practice (2nd Ed., 1948), Sec. 17.07, p. 1330. On application of this test, the insurance company subrogee qualifies as a real party in interest. This ruling likewise applies to a partial subrogee whose equitable rights in the cause of action qualifies it as a real party in interest.

This basic principle of real party in interest is found in the positive language of Judge Goodrich speaking for the Court below. This opinion states (R. 9):

> "The problem then arises as to the procedural position of a partial subrogee (insurer) under the Federal Rules. There can be little doubt that his equitable rights in any recovery made by the subrogor (insured) qualify the subrogee as a real party in interest under Rule 17 (a). Both insured and insurer 'own' portions of the substantive right against

In the case of *State Farm Mutual Liability Insurance Co. v. United States, supra,* the Court also held a partial subrogee to be a real party in interest. The Court stated, 172 Fed. 2nd, at page 739:

> "In view of the universally recognized equitable principal of subrogation, an insurance company having paid the whole loss, is the real party in interest within the meaning of Rule 17a, Federal Rules of Civil Procedure. (*Cases and statutes cited*). (Under Sec. 411, 28 U. S. C., Sec. 932 [See revised Sec. 1346]. The Federal Rules of Civil Procedure were made applicable to suits under the Federal Tort Claims Act). In the case at bar, appellant is only a partial subrogee, which may involve a problem of splitting cause of action. We think that a partial subrogee is a real party in interest, under Rule 17a, and as such has standing to sue in its own name, subject only to the right of ~~the~~ defendant, by the tort feasor."

making timely objection, to insist upon the joinder of the other parties in interest in order to avoid a split up of the cause of action." (italics mine)

See *Old Colony Insurance Company* v. *United States*, *supra*.

There is no denial that R.S. 3477 forms a part of the substantive law. We do not urge that this statute was repealed by the real party in interest provision under the Federal Rules of Civil Procedure. 3 Moore Federal Practice (2nd Ed., 1948), Sec. 17.09, p. 1338. These laws have separate spheres of operation, are mutually independent and not repugnant. In a proper case R.S. 3477 may be invoked to determine the substantive right, its function then ceases. If a substantive right exists that is not violative of the terms of R.S. 3477, then Federal Rule 17 (a) permits such party to sue in its own name as a real party in interest. *McWhirter* v. *Otis Elevator Co.*, 40 F. Supp. 1 (D. Ct., W. D. S. C., 1941).

The government avers that the correct and only workable rule is that the person originally sustaining the loss is *the* "real party in interest" under Rule 17 (a) (Br. 17, 18). An application of this rule defeats the right of a subrogee to assert in its own name a substantive right conferred by the Tort Claims Act. This rule, if applied, ignores and violates the basic doctrine of subrogation that permits the insurer to assert the rights and remedies of the insured against the tort feasor to the extent to which payment was made.

We admit that the insured may be a real party in interest in a case of partial subrogation. The insured qualifies as such by retaining a portion of the substantive right against the tort feasor. However, the insured is not the only real party in interest as urged by the government. Both the insured and insurers may be real parties in interest in a proper case. Each may sue individually to re-

cover its respective interest, subject to joinder on motion of a defendant. *First National Bank of Bloomingdale* v. *Manufacturers Trust Co.* (D. N. J., 1941), 5 Pike and Fischer Fed. Rules Serv. 17a. 141, Case 1. Since the requirement of joinder is solely for the protection of the defendant, it should be imposed only upon its insistence. The failure of the defendant to make a seasonable objection to the non-joinder should result in a waiver of it. *McWhirter* v. *Otis Elevator Co., supra.*

We submit that since the partial subrogee is a real party in interest a suit by it alone states a cause of action, the only defect being one of parties which is waived unless seasonable objection is made. *Delaware County* v. *Diebold Safe & Lock Co.*, 133 U. S. 473, 488; *Gaugler* v. *Chicago, M. & P. S. Ry. Co., supra;* and the opinion of the Court below (R. 10).

The government admits that the Courts have held that a partial subrogee is a real party in interest, and hence may maintain an action in its own name against the tort feasor (Br. 18). It avers that the rationale of this ruling is based on the fact that the subrogee was entitled to share in the recovery ultimately effected. Then it contends that this test of determining a real party in interest can not be reconciled with those cases dealing with loan receipts where an insured has been held to be a real party in interest, notwithstanding the fact that the insurer is entitled to share in any recovery against the tort feasor.

This argument is utterly erroneous and acutely fanciful. The record in the instant cases does not indicate that the insurers took back loan receipts from the insured. The instant suits are grounded upon the equitable doctrine of subrogation that arises independently of any contract or formal assignment. *Aetna Life Insurance Co.* v. *Middleport, supra; Liverpool and Great Western Steam Co.* v. *Phenix Insurance Company, supra.* Immediately upon

payment the insurer is subrogated to whatever rights and remedies the insured may have against the wrongdoer. The right of subrogation attaches to the cause of action that the insured has against the wrongdoer. As equitable owner of a part or the whole cause of action against the tort feasor, *a fortiori,* a subrogee has an interest in the recovery. The test is not the fact that the subrogee was entitled to share in the recovery, but rather the subrogee is the holder of a substantive right against the tort feasor that qualifies it as a real party in interest.

To overcome the ruling of the Court below that the subrogee is a real party in interest under Federal Rule 17 (a), the government urges a negative argument and contends that the insured is the most indispensable party and therefore the insured and not the subrogee is the only real party in interest. The question of indispensability is generally raised as a matter of defense. The government did not include this objection in its motions to strike the complaints in the District Court (R. 3-6). This objection was available to it by way of motion to strike under Federal Rule 19(a). This objection was not included in the Answer that the government filed. This question was not considered by the District Court and the issue was not raised on the appeal to the Court below.

It is observed that the urgency to hold the insured to be an indispensable party is now raised in this Court for the first time. It is difficult to reconcile the government's present position as it vigorously opposed the respondents' application in the District Court to add the insured as a party plaintiff (R. 6). The motion was dismissed by the District Court for coming out of time. We doubt whether this Court will countenance such legalistic maneuvers and permit the government to use such practices to defeat a substantive right conferred upon respondents by federal statute.

Aside from the inconsistent position assumed by the government in this instance, the argument now presented is without merit. The government assumes that the insured has a claim. The record does not establish this fact. The insured has no interest in the subject matter of these suits, as the respondents made full payment to her on the fire loss sustained.

The government states that without joining the insured no binding adjudication as to the existence and extent of subrogation can be obtained and payment of the insurer's judgment may not give the United States a valid discharge even *pro tanto* (Br. 13). It submits the same to meet all traditional tests as to indispensability. On the contrary, the test of indispensability is otherwise. An indispensable party is one whose interests are so bound up in the subject matter of the litigation and the relief sought that the Court cannot proceed without her, or proceed to a final judgment without affecting her interest. *Shields* v. *Barrow* (1854) 17 How. 130. See 3 Moore, Federal Practice (2nd Ed., 1948) Sec. 19.07, pp. 2150, 2151. *Div. 525, Order of Railway Conductors of America, et al.* v. *Gorman, et al.*, 133 F. 2nd, 273.

On applying the true test of indispensability it is evident that the insured has no interest that is so bound up in the subject matter of the litigation and the relief sought by the respondents to qualify her as an indispensable party. If the insured has a claim she would qualify as a necessary party. A correct statement of the rule was made by the Court below (R. 10):

> "It is clear that the property owner and other insurers, if any, are necessary parties, since their presence in the lawsuit is required to do complete justice by adjusting all rights. But they are not indispensable in the sense that a final decree cannot be made without affecting their interests or leaving the controversy in such a condition that its final determination is inconsistent with equity."

The government also contends that the insured is an indispensable party for the reason that where the insurer has paid less than the full loss, the right of action against the tort feasor remained in the property owner for the entire loss (Br. 16). In effect, the government contends that the insured is an indispensable party because it holds the naked legal title of the subrogee's equity. This is not the test. If it has no real interest in the subject matter of the suit, indispensability then precludes the insured. If the insured retains an interest in the cause of action by reason of partial subrogation, it becomes merely a necessary or proper party. The government concedes that this was the common law rule and was applied by some Courts prior to the adoption of the Federal Rules of Civil Procedure (Br. 16). Evidently the government wants this Court to re-invoke the rigid common law doctrine and deny relief to a subrogee whose substantive rights are equitable. In modern practice a single civil action is commenced to enforce either legal or equitable rights. Federal Rule 3. In an attempt to buttress this feeble contention the government erroneously states that an insurer is not entitled to the rights of equitable subrogation unless the full amount of the insured's loss has been paid (Br. 17). To accept this statement of the law denies the very existence of a partial subrogee, a party whom the government has recognized to have certain substantive rights throughout the entire proceedings.

Subrogation depends upon payment and arises whether an insurer makes partial or whole payment to the insured. In the case of *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Company*, 129 U. S. 397, 462, this Court held as follows:

> "An insurer of goods, upon paying to the assured the amount of a loss, total or partial, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's

> right of action against the carrier, and may assert that right in his own name in a court of admiralty."

A similar doctrine was applied in regard to fire insurance. In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Commercial Union Insurance Company*, 139 U. S. 223, 235, this Court stated:

> "In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss."

The government also urges that the insured is an indspensable party because the rights of a subrogee are subordinate and to permit a subrogee to sue in its own name makes it co-equal with the subrogor (Br. 17). This statement is erroneous and misconceives the fundamental doctrine of subrogation. We submit that the subrogee stands in the very shoes of the subrogor, enjoys the very substantive rights that accrue to the subrogor in a cause of action against the tort feasor. The rights are identical and the parties stand on the same level in asserting these rights against the wrongdoer. We submit that the foregoing argument of the government is legally deficient, contradictory on application and wholly irrelevant in attempting to establish the fact that an insured is an indispensable party.

The government criticizes the opinion of the Court below and charges that the Court drew an erroneous analogy on comparing a subrogee to a partial assignee as an aid in reaching the decision that a partial subrogee is a real party in interest under Federal Rule 17 (a). The analogy is a perfect one as a subrogee is an equitable assignee by operation of law. See the very learned discussion of the entire subject in 3 Moore, Federal Practice (2nd Ed., 1948) Sec. 17.09.

We shall reply briefly to the absurd argument that the government advances to support this erroneous contention. The determination of the right of a subrogee to sue in its own name as a real party in interest depends on whether or not it has a substantive right sought to be enforced. The solution of this question cannot be resolved on the basis of alleged complications and difficulties of the right of subrogation, the alleged denial of a valid discharge of tort feasor's obligation to insured on payment to subrogee, or that the insured accepted a compromise figure from insurer and intends to recover a greater amount from the tort feasor (Br. 14-16). In advancing this unsound argument it is eminently clear that the government is unfamiliar with the practice in a usual subrogation matter involving a tort feasor. It is a simple procedure securing to the subrogee its equitable right in the insured's cause of action against the tort feasor. We see no complications and difficulties existing in applying this doctrine of subrogation in a proper case. Vance, 2nd Ed., pp. 669, 670.

The government seeks protection to deal only with the insured and settle the claim directly with it. It is concerned that payment to a subrogee, or recovery of a judgment in favor of subrogee in its own name, would expose it to double liability and will not result in a valid discharge of its obligation to the insured (Br. 15).

We maintain that such practice would expose the government to greater peril and to a real rather than a potential liability of double payment. If a tort feasor is liable to the insured for a loss, and effects a settlement with the latter who obtains a release from all liability, with knowledge, actual or constructive, of the fact that the insurers have already paid to the insured the amount of the loss, the settlement and release will in no way affect the insurer's right of subrogation as against the tort feasor, since the settlement and release will be in fraud of the insured's rights, and consequently void. *Fire Association*

of Phila. v. *Wells,* 84 N. J. E. 484; 8 Couch on Insurance, Sec. 2001. This rule is likewise applicable in a case where the insured recovers a judgment against the tort feasor. *Martin* v. *Lehigh Valley R. R. Co.,* 90 N. J. L. 258. Since the government has knowledge of the subrogation rights of the respondents, it could not obtain a valid discharge on settlement and payment to the insured. We offer the government greater protection in dealing with the subrogee rather than the insured.

In opposing the right of a subrogee to sue in its own name the government suggests a cure by permitting the subrogees to intervene as parties plaintiff in an action filed by the insured. We find the following language in the government's brief (Br. 10):

> "By intervening as parties plaintiff under Civil Rule 24, they can protect their equitable interest by obtaining an express declaration in the judgment of their right to payment out of its proceeds (Cases cited)."

The right to intervene is predicated upon the right to sue. *Employers Fire Insurance Co.* v. *United States, supra,* If a subrogee has the right to intervene, *a fortiori,* a subrogee has the right to sue in its own name as a real party in interest. The subrogee or insured in a proper case involving partial payment of a total loss is a real party in interest. *Williams* v. *Powers,* 2 F. R. D. 362. Either may sue in its own name. Either party may intervene in an action filed by the other. Therefore, it cannot be urged that the insured is the *only* real party in interest.

We submit that a subrogee should not be relegated to the role of an intervener. The subrogee is the holder of a substantive equitable right against the tort feasor. It has paid the loss resulting from the tortious conduct of the wrongdoer. It should be permitted to sue in its own name as a real party in interest to protect its equitable substantive rights. The assertion of this right should not

depend upon the election of the insured to sue in its own name. If the insured should fail or refuse to file suit, the insurer is left without a remedy since no action is pending in which the subrogee can intervene. Under such circumstances, the government tort feasor would never be required to pay damages for the tort it committed and thus be the recipient of an unjust and inequitable windfall.

This brief is a direct reply to the matters raised by the government in the brief that it filed with this Court. This was compelled because of the shifting position of the government in each Court. An examination of the government's brief discloses that it is largely devoted to matters beyond the record, and particularly outside the grounds of the motions filed in the District Court. Under the Federal Rules of Civil Procedure the motions were made under Federal Rule 12 (b) (6); "failure to state a claim upon which relief can be granted." The motions raised no questions with respect to the matters covered by subdivisions ~~(1)~~-(5) inclusive of that rule, relating to lack of jurisdiction over the subject matter and person, improper venue, insufficiency of process and insufficiency of service of process. At the time no other defenses could be raised by motion under the Federal Rules. The failure to join an indispensable party was subsequently added. Federal Rule 12 (b) (7).

The cases in their present position do not, therefore, present any question as to non-joinder of parties; as to whether or not the insurers are the real parties in interest under Federal Rule 17 (a); nor as to whether or not there has been a splitting of a single cause of action resulting in multiplicity of suits. This Court may readily dismiss all of these objections for the reason that none of them has been raised by any motion or pleading by the government.

CONCLUSION

Since an insurance company subrogee is the holder of an equitable substantive right under the Tort Claims Act, we submit that in view of the decision of the Court below and in view of the argument herein made, the right of a subrogee to sue in its own name as a real party in interest under Federal Rule 17 (a) remains inviolate. This right should not be limited by a strained extension and application of R.S. 3477, nor should this absolute right to assert a cause of action affirmatively be impaired or destroyed by the several objections raised by the government in respect to the statutory and administrative protection it seeks in the prosecution of tort claims. The Federal Rules of Civil Procedure, a flexible and resilient code, promulgated by this Court, if properly invoked, affords the government as it does to a private litigant, adequate protection in litigation arising under the Tort Claims Act.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below be affirmed.

ABRAHAM FRANKEL,
Attorney for Respondents.